

SUPREME COURT, U. S.

FILED

AUG 28 1973

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973
No. 72-1322

CAROLYN BRADLEY, *et al.*,

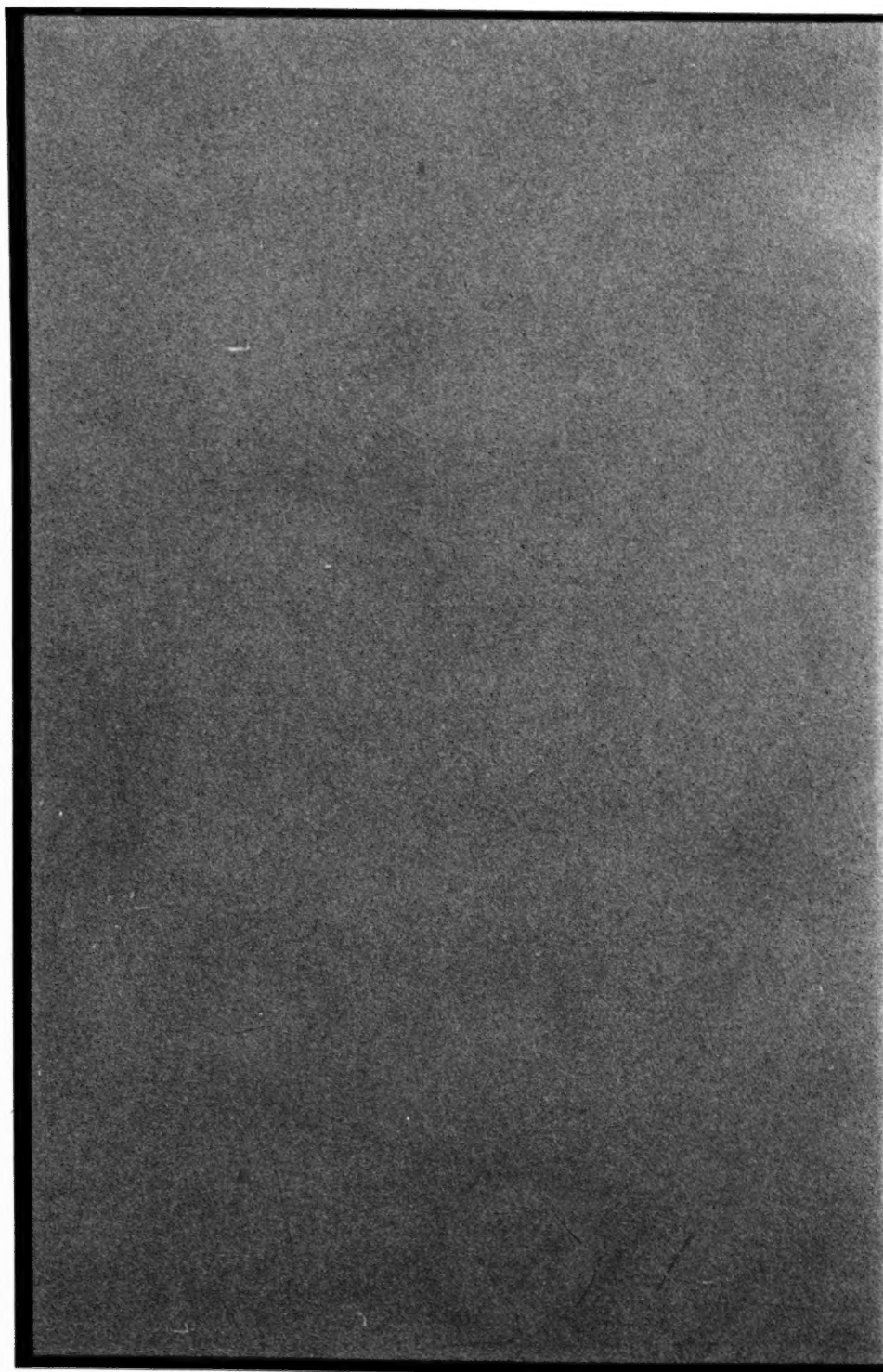
Petitioners,

—v.—

THE SCHOOL BOARD OF THE CITY
OF RICHMOND, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 29, 1971
CERTIORARI GRANTED JUNE 11, 1973



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1322

CAROLYN BRADLEY, *et al.*,
Petitioners,

—v.—

THE SCHOOL BOARD OF THE CITY
OF RICHMOND, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Chronological List of Relevant Docket Entries

September 5, 1961	Complaint filed.
March 30, 1966	School Board's desegregation plan and Order approving plan filed.
March 10, 1970	Motion for Further Relief filed by Plaintiffs.
March 12, 1970	Order that School Board advise the Court within ten days if public schools being operated in accordance with constitutional requirements.
March 19, 1970	Statement of School Board filed.
March 31, 1970	Hearing.
April 1, 1970	Order that Plaintiffs' Motion for Further Relief be granted; order of 3-30-66 is thereby vacated; School Board to file before 5-11-70 a plan for unitary system.
May 11, 1970	Report and Motion of School Board filed by its attorneys.
June 19-20, 1970	Hearing.
June 25-26, 1970	Hearing.
June 26, 1970	Order disapproving plan of School Board; Board to submit plan and hearing set for August 7, 1970.
July 2, 1970	Motion of Plaintiffs for attorneys' fees, etc.
July 23, 1970	School Board Interim Plan filed.

Chronological List of Relevant Docket Entries

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|-------------------|--|
| July 23, 1970 | Motion for leave to file third party complaint against School Board of Chesterfield County and School Board of Henrico County filed by City of Richmond. |
| August 7, 1970 | Motion by School Board to file third party complaint against School Boards of Chesterfield and Henrico Counties. |
| August 7, 1970 | Hearing. |
| August 17, 1970 | Memorandum of the Court filed; Order that School Board's plan filed 7-23-70 be approved for term commencing 8-31-70; Counsel for Plaintiffs and School Board to confer as to payment of counsel fees and costs and report to Court within 45 days. |
| November 18, 1970 | Hearing. |
| December 5, 1970 | Order directing joinder of parties needed for just adjudication. |
| December 9, 1970 | Plaintiffs' motion for implementation of Plaintiffs' plan for second semester filed. |
| January 15, 1971 | School Board plans for desegregation filed. |
| January 29, 1971 | Memorandum and Order denying Plaintiffs' motion for implementation of Plaintiffs' plan. |
| February 5, 1971 | Notice of Appeal from Order of January 29, 1971 filed by Plaintiffs. |

Chronological List of Relevant Docket Entries

March 4, 1971	Hearing.
April 5, 1971	Memorandum and Order of Court approving School Board Plan III.
April 16, 1971	Hearing.
April 23, 1971	Hearing.
May 17, 1971	Hearing.
May 26, 1971	Memorandum and Order filed directing School Board to pay to Plaintiffs' counsel \$56,419.65 from 3-10-70 through 1-29-71.
June 17, 1971	Motion for contempt filed by Plaintiffs.
June 18, 1971	Notice of Appeal from May 26 Order filed by School Board.
June 21, 1971	Hearing; Motion for contempt denied.
June 22, 1971	Order and Memorandum filed directing payment of counsel fees and denying Board's motion for stay.

Amended Complaint

(Filed January 4, 1962)

I

1. (a) Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. This action arises under Article 1, Section 8, and the Fourteenth Amendment of the Constitution of the United States, Section 1, and under the Act of Congress, Revised Statutes, Section 1977, derived from the Act of May 31, 1870, Chapter 114, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981), as hereafter more fully appears. The matter in controversy, exclusive of interest and cost, exceeds the sum of Ten Thousand Dollars (\$10,000.00).

(b) Jurisdiction is further invoked under Title 28, United States Code, Section 1343. This action is authorized by the Act of Congress, revised Statutes, Section 1979, derived from the Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13 (Title 42, United States Code, Section 1983), to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States and by the Act of Congress, Revised Statutes, Section 1977, derived from the Act of May 31, 1870, Chapter 114, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981), providing for the equal rights of citizens and of all persons within the jurisdiction of the United States as hereafter more fully appears.

II

2. Infant plaintiffs are Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the political subdivision of Virginia for which the defendant school board main-

Amended Complaint

tains and operates public schools. Said infants are within the age limits of eligibility to attend, and possess all qualifications and satisfy all requirements for admission to, said public schools.

3. Adult plaintiffs are Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in said political subdivision. They are parents or guardians or persons standing *in loco parentis* of one or more of the infant plaintiffs.

4. Plaintiffs bring this action in their own behalf and, there being common questions of law and fact affecting the rights of all other Negro children attending public schools in the Commonwealth of Virginia and, particularly, in said political subdivision, and the parents and guardians of such children, similarly situated and affected with reference to the matters here involved, who are so numerous as to make it impracticable to bring all before the court, and a common relief being sought, as will hereinafter more fully appear, the plaintiffs also bring this action, pursuant to Rule 23(a) of the Federal Rule of Civil Procedure, as a class action on behalf of all other Negro children attending public schools in the Commonwealth of Virginia and, particularly, in said political subdivision, and the parents and guardians of such children, similarly situated and affected with reference to the matters here involved.

III

5. The Commonwealth of Virginia has declared public education a state function. The Constitution of Virginia, Article IX, Section 129, provides:

“Free schools to be maintained. The General Assembly shall establish and maintain an efficient system of public free schools throughout the State.”

Pursuant to this mandate, the General Assembly of Virginia has established a system of public free schools in

Amended Complaint

the Commonwealth of Virginia according to a plan set out in Title 22, Chapters 1 to 15, inclusive, of the Code of Virginia, 1950. The establishment, maintenance and administration of the public school system of Virginia is vested in a State Board of Education, a Superintendent of Public Instruction, Division Superintendents of Schools, and County, City and Town School Boards (Constitution of Virginia, Article IX, Sections 130-133; Code of Virginia, 1950, Title 22, Chapter 1, Section 22-2).

IV

6. The defendant school board, the corporate name of which is stated in the caption, exists pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative department of the Commonwealth, discharging governmental functions, and is declared by law to be a body corporate. Said school board is empowered and required to establish, maintain, control and supervise an efficient system of public free schools in said political subdivision, to provide suitable and proper school buildings, furniture and equipment, and to maintain, manage and control the same, to determine the studies to be pursued and the methods of teaching, to make local regulations for the conduct of the schools and for the proper discipline of the students, to employ teachers, to provide for the transportation of pupils, to enforce the school laws, and to perform numerous other duties, activities and functions essential to the establishment, maintenance and operation of the public free schools in said political subdivision. (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, as amended, Title 22.)

7. The defendant division superintendent of schools, whose name as such officer is stated in the caption, holds office pursuant to the Constitution and laws of the Commonwealth of Virginia as an administrative officer of the public free school system of Virginia. (Constitution of Virginia, Article IX, Section 133; Code of Virginia, 1950, as amended,

Amended Complaint

Title 22.) He is under the authority, supervision and control of, and acts pursuant to the orders, policies, practices, customs and usages of the defendant school board. He is made a defendant herein in his official capacity.

8. A Virginia statute, first enacted as Chapter 70 of the Acts of the 1956 Extra Session of the General Assembly, viz, Article 1.1 of Chapter 12 of Title 22 (Sections 22-231.1 through 22-232.17) of the Code of Virginia, 1950, as amended, confers or purports to confer upon the Pupil Placement Board all powers of enrollment or placement of pupils in the public schools in Virginia and to charge said Pupil Placement Board to perform numerous duties, activities and functions pertaining to the enrollment or placement of pupils in, and the determination of school attendance district for, such public schools, except in those counties, cities or towns which elect to be bound by the provisions of Article 1.2 of Chapter 12 of Title 22 (Sections 22-232.18 through 22-232.31) of the Code of Virginia, 1950, as amended. (Section 22-232.30 of the Code of Virginia, 1950, as amended.) The names of the individual members of the Pupil Placement Board are stated in the caption.

V

9. Notwithstanding the holding and admonitions in *Brown v. Board of Education*, 347 U.S. 483, and 349 U.S. 294, the pre-existing pattern of racial segregation in the public schools maintained and operated by the defendant school board continues unaffected except in the few instances, if any there are, in which individual Negroes have sought and obtained admission to schools other than those attended exclusively by Negroes. The defendants have not devoted efforts toward initiating nonsegregation and bringing about the elimination of racial discrimination in the public school system, neither have they made a reasonable start to effectuate a transition to a racially non-discriminatory school system, as under paramount law it is

Amended Complaint

their duty to do. Deliberately and purposefully, and solely because of race, the defendants continue to require all or virtually all Negro public school children to attend school where none but Negroes are enrolled and to require all white public school children to attend school where no Negroes, or at best few Negroes, are enrolled.

10. As matters of routine, every white child entering school for the first time is initially assigned to and placed in a school which predominantly, if not exclusively, is attended by white children; or if otherwise assigned, then, upon request of the parents or guardians, such child is transferred to a school which, being attended exclusively or predominantly by white children, is considered as a school for white children. Upon graduation from elementary school, every white child is routinely assigned to a high school or junior high school which is predominantly, if not exclusively, attended by white children. Similarly, and with few if any exceptions, Negro children entering school for the first time are initially assigned to a school which none but Negroes attend upon their graduation from elementary school they are routinely assigned to a high school or to a junior high school which none but Negroes attend.

11. To avoid the racially discriminatory result of the practice described in the paragraph next preceding, the Negro child, or his parent or guardian for him, is required to make application for transfer from the school which none but Negroes attend to a school specifically named. In acting upon such application for transfer from the all-Negro school, the defendants take into consideration certain criteria which defendants do not consider when making initial enrollments or placements in any school other than the initial placement or enrollment of a Negro child in a school which white children attend. If such criteria are not met, the application for transfer is denied. For example, if the home of the applicant is closer to the school to which he has been assigned than to the school to which

Amended Complaint

transfer is sought, the application is denied notwithstanding the fact that the latter school is attended by white children similarly situated with respect to residence. For further example, if intelligence, achievement or other standardized test scores or other academic records of the applicant do not compare favorably with the best or the better of similar scores or records of children attending or assigned to the school which the applicant seeks to attend, the application is denied notwithstanding the fact that many white children attending said school have lower scores or lower academic records than the applicant has.

VI

12. Timely application was made to the defendants for the admission of each infant plaintiff to a public school in said political subdivision heretofore and now attended exclusively or predominantly by white persons. The refusal of such application was made known to the parent, guardian, of each infant plaintiff by letter from the Pupil Placement Board indicating the placement of the child in a certain school, which school is one attended exclusively by Negroes. In the case of each infant plaintiff, a written protest of such placement was made to the Pupil Placement Board within the time prescribed by statute; whereupon the Pupil Placement Board scheduled a hearing upon said protest. In the case of each infant plaintiff, but only to the extent that such details can now be stated with certainty, the attached "Schedule 'A'" sets out: (1) the name of the infant plaintiff, (2) the school assignment to which is sought, (3) the date of the letter from the Pupil Placement Board and the name of the all-Negro school in which the infant plaintiff was placed, (4) the reason assigned for denial of the application, and (5) the date and place of the hearing on the protest of the placement. Notwithstanding the said protest and hearing thereon, the Pupil Placement Board confirmed its placement previously made in the case of each of the infant plaintiffs.

Amended Complaint

13. But for the deliberate purpose of the defendants to avoid performance of their duty as hereinabove mentioned in paragraph 9 hereof, plaintiffs would have had no need to apply for attendance at certain schools. But for the fact that the defendants intended to maintain the racially segregated pattern of public schools through the routine practices described in paragraph 10 hereof, the applications made on behalf of the infant plaintiffs would have been granted. Solely by reason of the practices, customs, usages and calculated result thereof as mentioned and complained of in paragraph 11 hereof, the placement of each infant plaintiff in an all-Negro school was confirmed, even after protest. Unless and until the defendants, as a result of injunction or otherwise, will cease and desist from the practice and usage mentioned in paragraph 11, applications and protests will be vain and futile when made on behalf of any Negro child situated as the infant plaintiffs are with regard to residence or with regard to intelligence, achievement or other standardized test scores or other academic records.

VII

14. The refusal of the defendants to grant the requested assignments, viewed in the light of the refusal of the defendants to bring about the elimination of racial discrimination in the public school system and to make a reasonable start to effectuate a transition to a racially non-discriminatory system, constitutes a deprivation of the liberty of the infant plaintiffs as well as all other Negro public school children within said political subdivision and a denial of their right to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States, and a denial of rights secured by Title 42, United States Code, Section 1981.

15. Plaintiffs and those similarly situated and affected are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the policy,

Amended Complaint

practice, custom and usage and the actions of the defendants herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than this complaint for an injunction. Any other remedy to which plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as would deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury and occasion damage, vexation and inconvenience.

VIII

WHEREFORE, plaintiffs respectfully pray:

(A) That this Court enter an interlocutory and a permanent injunction restraining and enjoining defendants, and each of them, their successors in office, and their agents and employees, forthwith, from denying infant plaintiffs, or either of them, solely on account of race or color, the right to be enrolled in, to attend and to be educated in, the public schools to which they, respectively, have sought admission;

(B) That this Court enter a permanent injunction restraining and enjoining defendants, and each of them, their successors in office, and their agents and employees from any and all action that regulates or affects, on the basis of race or color, the initial assignment, the placement, the transfer, the admission, the enrollment or the education of any child to and in any public school;

(C) That, specifically the defendants and each of them, their successors in office, and their agents and employees be permanently enjoined and restrained from denying the application of any Negro child for assignment in or transfer to any public school attended by white children when such denial is based solely upon requirements or criteria which do not operate to exclude white children from said school;

Amended Complaint

(D) That the defendants be required to submit to the Court a plan to achieve a system of determining initial assignments, placements or enrollments of children to and in the public schools on a non-racial basis and be required to make periodical reports to the Court of their progress in effectuating a transition to a racially non-discriminatory school system; and that during the period of such transition the Court retain jurisdiction of this case;

(E) That defendants pay to plaintiffs the costs of this action and attorney's fees in such amount as to the Court may appear reasonable and proper; and

(F) That plaintiffs have such other and further relief as is just.

**SCHEDULE "A" TO COMPLAINT THE SCHOOL BOARD OF THE CITY OF
RICHMOND, VA., ET AL, DEFENDANTS**

13a

Amended Complaint

1	2	3	4	5
<i>Infant Plaintiff</i>	<i>Desired Assignment</i>	<i>Date of Letter From Pupil Placement Board and Placement Made Thereby</i>	<i>Reason Assigned For Denial</i>	<i>Date and Place Of Hearing on Protest</i>
Carolyn Bradley	Chandler Jr. High	July 17, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Michael Bradley	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	
Rosalind Dobson	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Morgan N. Jackson	John Marshall High	July 18, 1961 Maggie Walker High	Distance from school	August 18, 1961 Richmond, Virginia
Bruce W. Johnson	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
John Edward Johnson, Jr.	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Phyllis Antoinette Johnson	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Robert S. Meyers	Chandler Jr. High	July, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Daria A. Cameron	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
William Dunbar Quarles, Jr.	Chandler Jr. High	July, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia
Lemuel Wimbish, Jr.	Chandler Jr. High	July 18, 1961 Benjamin Graves	Lack of academic qualifications	August 18, 1961 Richmond, Virginia

Answer of School Board

(Filed June 21, 1962)

Answer of the School Board of the City of Richmond and H. I. Willett, Division Superintendent of Schools of the City of Richmond

For their joint and several answers in this case the defendants, The School Board of the City of Richmond and H. I. Willett, Division Superintendent of Schools of the City of Richmond, answer and say:

1. These defendants do not deny the jurisdiction stated in paragraph 1 of the amended bill of complaint, but they deny that any action of theirs, or either of them, has deprived the plaintiffs, or any of them, under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or any amendment thereto, or any act of Congress, as alleged in paragraph 1 of the amended bill of complaint.
2. These defendants deny the allegations of paragraphs 2, 3 and 4 of the amended bill of complaint.
3. These defendants admit the allegations of paragraph 5 of the amended bill of complaint.
4. These defendants admit the allegations of paragraph 6 of the amended bill of complaint, except that they say that while The School Board of the City of Richmond is empowered to provide school buildings, title to such property in the City of Richmond is vested in the City of Richmond as provided for by § 22-94 of the Code of Virginia, and only such school buildings are provided, maintained and operated in the City of Richmond as are authorized by the City Council to be provided, maintained and operated, and at such places as are designated and within the limitations of funds provided by the Council for the purpose in the exercise of its discretion; and except that the performance of the other function alleged in paragraph 6 are subject to appropriation of funds for such purposes by the City Council in the exercise of its discretion.

Answer of School Board

5. These defendants admit the allegations of paragraph 7 of the amended bill of complaint, except that they say that the defendant, H. I. Willett, as Division Superintendent of Schools is under the authority, supervision and control, and acts pursuant to, the orders, policies, practices, customs and usages of the defendant, The School Board of the City of Richmond, only to the extent that there is no conflict with the provisions of §§ 22-36 and 22-97 and with §§ 22-232.1 through 22-232.17 of the Code of Virginia, as amended by chapter 500 of the Acts of Assembly of 1958, known as the Pupil Placement Act, or with any other statute of the Commonwealth of Virginia.

6. These defendants admit the allegations of paragraph 8 of the amended bill of complaint, except that they say: (a) that § 22-232.1 of the Code of Virginia, which is a part of the Pupil Placement Act, has divested these defendants of all power and authority "now or at any future time" to determine the school to which the plaintiffs and any other child shall be admitted; (2) that article 1.2 of Chapter 12 of Title 22 (§§ 22-232.18 through 22-232.31) of the Code of Virginia is not applicable or operative in the City of Richmond because the defendant, The School Board of the City of Richmond, has not recommended to the Council or governing body of the City of Richmond that the provisions of article 1.2 of chapter 12 of Title 22 of the Code of Virginia be made applicable or operative in the City of Richmond, nor has the Council or governing body taken any action with respect thereto; (c) that it is within the uncontrolled discretion of the defendant, The School Board of the City of Richmond, and the Council or governing body of the City of Richmond whether the provisions of article 1.2 of chapter 12 of Title 22 of the Code of Virginia shall be applicable or operative in the City of Richmond; and (d) that these defendants are wholly without power to admit the plaintiffs and any other child to a public school in the City of Richmond, except in the sense that they may per-

Answer of School Board

form purely ministerial acts when clearly authorized by law so to do.

7. These defendants deny all of the allegations of paragraphs 9 through 15 of the amended bill of complaint; and say: (a) that these defendants have been divested of all power and authority "now or at any future time" to determine the school to which the plaintiffs and any other child shall be admitted; (b) that these defendants are wholly without power to admit the plaintiffs and any other child to a public school in the City of Richmond, except in the sense that they may perform purely ministerial acts when clearly authorized by law so to do; and (c) that these defendants have done no act that has deprived the plaintiffs, or any of them, or any other child under color of state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or any amendment, thereto, or any act of Congress.

FURTHER ANSWER

Further answering, these defendants jointly and severally say the purpose of the bill of complaint is to obtain the entry of an order which will enjoin and restrain the enforcement, operation and execution of the Pupil Placement Act, by restraining the action of officers of the State of Virginia in the enforcement and execution of the statute, and of an order or orders made by an administrative board or commission acting under such statute, upon the ground of the unconstitutionality of the statute. Under the provisions of Title 28 U.S.C.A., section 2281, such an injunction cannot be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under Title 28, U.S.C.A., section 2284.

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**Excerpts from Transcript of Proceedings
of March 30, 1966**

THE CLERK: Civil Action 3353 Caroline Bradley and Michael Bradley, et al. v. The School Board of the City of Richmond, Virginia, et al.

Henry L. Marsh, III represents the plaintiff and Mr. Henry T. Wickham represents the defendant.
Counsel ready?

MR. MARSH: Ready for the plaintiff.

MR. WICKHAM: Yes, sir.

If Your Honor please, at this time I would like to file a resolution of the School Board, City of Richmond, that was adopted today, March 30th, attached to which is a desegregation plan for the Richmond Public School System.

I might say that the plaintiffs and the defendants have agreed to this plan and accordingly would ask permission to file it now and present to the Court an order permitting that it be filed and approving the plan as filed.

THE COURT: Is this the same as the draft that was furnished?

MR. WICKHAM: The same as I left with your secretary on Monday morning, I believe.

THE COURT: Well, I have studied that.

Mr. Marsh, do you wish to be heard on this?

MR. MARSH: May it please the Court, we participated in the negotiations with the school board and this plan represents the agreement that was reached as a result of several weeks of negotiations and I think that the plaintiffs are satisfied with this plan and we would like for the Court to approve it.

Excerpts from Transcript of Proceedings of March 30, 1966

THE COURT: You join in the motion?

MR. MARSH: Yes, sir.

THE COURT: Very well.

Gentlemen, in *Bradley v. The School Board* 382 U.S. 103 (1965) this action was remanded to this court for hearings and proceedings consistent with the opinion of the Supreme Court. The Court set the case down for hearing. In the meanwhile the parties conferred and as a result of their conferences the school board has tendered to the Court a revised plan.

The plaintiffs offered no objection to the plan and state that it meets with their approval. Accordingly, the parties being in agreement, the Court will approve the plan.

* * *

**Resolution of the School Board of the
City of Richmond**

(Filed March 30, 1966)

BE IT RESOLVED by The School Board of the City of Richmond:

1. That the **DESEGREGATION PLAN FOR THE RICHMOND PUBLIC SCHOOL SYSTEM**, dated March 30, 1966, a copy of which is attached hereto, is hereby approved and adopted.

2. That this Plan and a certified copy of this resolution be submitted to the United States District Court for the Eastern District of Virginia, Richmond Division.

3. That, subject to the approval of the Court, this Plan shall be in effect for the 1966-67 school year, and each school year thereafter until changed with the approval of the Court.

Adopted:

March 30, 1966

A TRUE COPY, TESTE:

.....
Clerk of The School Board of the
City of Richmond, Virginia

Desegregation Plan for the Richmond Public School System

(Filed March 30, 1966)

PROFESSIONAL PERSONNEL

The School Board of the City of Richmond recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the Richmond City Public School System without regard to race or color. It further recognizes its obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color. In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other professional staff among the various schools of the system will not be such that schools are identifiable as intended for students of a particular race, color or national origin, or such that teachers or other professional staff of a particular race are concentrated in those schools where all, or the majority, of the students are of that race.

The program to be utilized in carrying out these responsibilities includes the following:

1. The best person will be sought for each position without regard to race, and Negroes will be sought for important positions in order to demonstrate that job opportunities are available for those who meet the necessary requirements.
2. The School Board will seek to select personnel without regard to race, and will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties. This, of course, does not mean

*Desegregation Plan for the
Richmond Public School System*

intentionally selecting a person of less ability to accomplish desegregation, but rather it means working toward the goal of desegregation of faculties in all schools.

3. In the recruitment and employment of teachers and other professional personnel, all applicants and other prospective employees will be informed that the City of Richmond operates a racially integrated school system and that the teachers and other professional personnel are subject to assignment in the best interest of the school system and without regard to their race or color.

4. The School Board will take affirmative steps to solicit and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.

5. In the process of faculty desegregation, consideration will be given to the assignment of "roving" and "special teachers".

6. In filling faculty vacancies which occur prior to the opening of each school year, preferential consideration will be given to presently employed teachers of the race opposite the race that is in the majority in the faculty at the school where the vacancy exists. In making such transfers account will be taken of the criteria utilized in approving transfers for other reasons.

PUPILS

The School Board of the city of Richmond recognizes its obligation to eliminate a dual school system in the assign-

*Desegregation Plan for the
Richmond Public School System*

ment of pupils. In the implementation of its present plan, the School Board recognizes that it has the responsibility to create and maintain an environment in which there is a freedom of choice based on positive information without restrictive pressures. The School Board further recognizes a responsibility to seek reasonable positive steps that are educationally sound to prevent and/or minimize the isolation of one ethnic group from contact with other groups.

The program to be utilized in carrying out these responsibilities includes the following:

1. The School Board's chief responsibility is to provide high quality education for all the children of Richmond. Sound educational goals include opportunities for white children and Negro children to associate on equal terms in the public schools as do children of various religions and national origins.
2. The pattern of assignment of teachers and other professional staff among the various schools will not be such that schools are identifiable as intended for students of a particular race, color, or national origin; or such that teachers or other professional staff of a particular race are concentrated in those schools where all or the majority of the students are of that race.
3. The School Board recognizes that any plan of desegregation must be evaluated in terms of results and the Board is taking positive steps to meet its responsibility. These steps include procedures such as the following:
 - (a) Where schools in close proximity to each other have significant inequality in enrollment in relation-

*Desegregation Plan for the
Richmond Public School System*

ship to capacity, the School Board recognizes a responsibility to take positive steps to correct such inequities.

(b) Pupils in all schools will be acquainted with opportunities in other schools, particularly when pupils are finishing the last grade in one school and moving to another school.

(c) City-wide centers are being planned that will serve pupils from all areas of the city, and student workshops and city-wide institutes and seminars have been conducted and plans are being made for expansion on a city-wide or city area basis.

4. If the steps taken by the School Board do not produce significant results during the 1966-67 school year, it is recognized that the freedom of choice plan will have to be modified with consideration given to other procedures such as boundary lines in certain areas.

CONSTRUCTION

The program for construction of new schools or additions to existing schools will not be designed to perpetuate, maintain, or support racial segregation.

SPECIAL PROGRAMS

The same principles (where applicable) pertaining to pupils, professional staff, and construction for regular day schools shall also be applied to all special programs administered by the School Board such as programs of adult education, education of the handicapped children, and education of the economically and culturally disadvantaged children.

March 30, 1966

Order

(Filed March 30, 1966)

On motion of the defendants, and with the consent of the plaintiffs, by counsel, leave is granted the defendants to file their DESEGREGATION PLAN FOR THE RICHMOND PUBLIC SCHOOL SYSTEM dated March 30, 1966 and a certified copy of the resolution approving and adopting the Plan, which resolution was adopted on March 30, 1966, and said Plan and copy of the resolution are filed.

Upon consideration whereof, it is ADJUDGED, ORDERED and DECREED:

1. That the DESEGREGATION PLAN FOR THE RICHMOND PUBLIC SCHOOL SYSTEM dated March 30, 1966, is approved.
2. That the School Board shall put the Plan into effect for the 1966-67 school year.
3. That the Court retain jurisdiction of this action.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

March 30, 1966.

Motion for Further Relief

(Filed March 10, 1970)

Plaintiffs move that, in light of the opinions of the United States Supreme Court in *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968), *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) and *Carte v. West Feliciana Parish School Bd.*, No. 944 (O.T. 1969, January 14, 1970), and also in the light of recent decisions of the United States Court of Appeals for the Fourth Circuit, the Court require the defendant school board forthwith to put into effect a method of assigning children to public schools and to take other appropriate steps which will promptly and realistically convert the public schools of the City of Richmond into a unitary non-racial system from which all vestiges of racial segregation will have been removed; and that the Court award a reasonable fee to their counsel to be assessed as costs.

/s/ M. RALPH PAGE

/s/ RONALD D. EALEY

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Order

(Filed March 12, 1970)

It appearing to the Court that the plaintiffs have moved for further relief in this cause, and to the end that the Court may properly schedule its docket, and deeming it proper so to do,

It is ORDERED that the defendants shall, within ten days from this date, advise the Court if it is their position that the public schools of the City of Richmond, Virginia are being operated in accordance with the constitutional requirements to operate unitary schools as enunciated by the United States Supreme Court.

It is further ORDERED that in the event the defendants cannot properly assert that the operation of the public schools of the City of Richmond is in compliance as aforesaid, then they shall advise the Court the amount of time they deem will be required to submit a plan for the operation of the public school system of the City of Richmond which they feel will bring them in compliance with the requirements of the Constitution.

Let the Clerk send copies of this order to all counsel of record.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

March 12, 1970.

Statement of Defendant Richmond School Board

(Filed March 19, 1970)

The defendants aver and state as follows:

1. They have operated the school system and educational facilities of the City of Richmond to the best of their knowledge and belief in accordance with the decree of this Court entered on the 30th day of March, 1966.
2. The implementation of the said decree permits any child to attend any school located within the City so long as the said school provides instruction in the grade to which the child wishes to attend.
3. They have been advised that the public schools of the City of Richmond are not being operated as unitary schools in accordance with the most recent enunciations of the Supreme Court of the United States.
4. They have requested the Department of Health, Education and Welfare to make a study and recommendation that will ensure the operation of the unitary school system in continuing compliance with the decisions of the United States Supreme Court.
5. The Department of Health, Education and Welfare has agreed to undertake the aforesaid study and recommendation involving the Richmond Public Schools and that its findings will be made available on or about May 1, 1970.
6. They will submit a plan for the operation of the public school system of the City of Richmond not later than May 11, 1970, which they feel will bring them in compliance with the requirements of the Constitution.

THE SCHOOL BOARD OF THE CITY
OF RICHMOND, VIRGINIA, et al.

**Excerpts from Transcript of Proceedings
of March 31, 1970**

[3] The Clerk: Civil Action 3353, Carolyn Bradley, and Michael Bradley, et al., versus the School Board, City of Richmond.

Mr. S. W. Tucker represents plaintiffs.

Mr. Henry T. Wickham represents defendant.

The Court: All right, gentlemen.

Yes, Mr. Ely, how are you?

Mr. Ely: May it please the Court, I would like to present to the Court Mr. Norman J. Chachkin, member of the Arkansas bar. He has not formally qualified to practice in this court, but he meets all of the qualifications for such, and at a later date those qualifications will be memorialized in writing.

This is Mr. Chachkin.

The Court: Delighted to have you with us, Mr. Chachkin.

Mr. Chachkin: Delighted to make it, Your Honor.

The Court: I asked you to appear here for a pre-trial conference for the very reasons stated, the order concerning the issue raised by plaintiffs' motion and defendant's statement filed March 19. And I want to set trial dates. I have got to get this docket straight. It is fairly obvious, **[4]** it seems to me without prejudging it now, and I want to treat this as a pre-trial conference, that any actions to be taken in reference to any further relief, if the plaintiffs are entitled to any further relief, are by virtue of the Alexandria case and the cases and decisions of the United States Supreme Court and this Circuit in Halifax that precludes any delay beyond the beginning of the next school term if any further relief is granted, which means that the School Board, if further relief is granted, ought to know as soon as possible where they are going.

*Excerpts from Transcript of Proceedings
of March 31, 1970*

I would imagine it must be quite a task to make any rearrangements.

Now, what I want to know, and I want to know it just as straight as a die, without any hesitation, and I direct myself to counsel for the School Board, is the City of Richmond today, the School Board, City of Richmond, today operating a unitary school system where there are neither black nor white schools, as required by law? And I don't want any answer, please, that tells me they are advised one way or the other. I want to know whether there is any issue about it. If there is, they certainly have a right to make an issue of it, if they can honestly do so. I want to set it down for hearing.

If there is no issue then I want to know why I can't rule that the plaintiff is forthwith entitled to further [5] relief and enter a mandatory injunction against the defendants for operating a system contra to the law.

Now, are they or aren't they? Without "they are advised or they are not advised." What is their position? That is all I want to know. I can't be plainer than that.

Mr. Wickham: It is the School Board's position they are not operating a unitary system.

The Court: Is it your position then that the plaintiffs under the law, without saying what relief, are entitled to further relief, Mr. Wickham?

Mr. Wickham: That is correct.

The Court: That saves the necessity of any hearing in reference to that, gentlemen. And there is no question.

I would now like to discuss the mechanics, and I think that is all it is, the mechanics as to whether or not the Court—well, the Court has now ruled that the plaintiffs are entitled to further relief based upon the very frank representation of the defendants.

*Excerpts from Transcript of Proceedings
of March 31, 1970*

Does that put us in a position where the Court ought to enter a mandatory injunction, as is usual in this case, directing that they forthwith file a plan? When I say forthwith, I mean such time as these gentlemen tell me they think they need on that. So we can go from there. Isn't [6] that the appropriate step, the next step? Is there any objection to a mandatory injunction enjoining them to do what they are supposed to do? Doesn't that really lay it on the line to them?

Mr. Wickham: It is—we are already under an injunction, Your Honor.

The Court: Sir?

Mr. Wickham: We are already under an injunction, Your Honor.

The Court: By whom?

Mr. Wickham: By this Court.

The Court: In what regard? When was it entered?

You mean to operate a freedom of choice?

Mr. Wickham: No.

The Court: You mean by the law?

Mr. Wickham: That is correct, Your Honor.

The Court: But you are not under any specific injunction so that the responsibility—

Mr. Wickham: It was a general order entered enjoining the School Board from operating a dual system of schools or operating a segregated school system back in 1964.

The Court: They have done that innocently, did it under the erroneous impression that freedom of choice was all right.

[7] Well, it is all right if it works, but it doesn't work.

Well, that order is herewith vacated. Freedom of choice. Of course it is vacated. So there is no misunderstanding. I think for their protection I best enter a mandatory in-

*Excerpts from Transcript of Proceedings
of March 31, 1970*

junction, as I do in the usual cases, enjoining them from operating schools in any method other than in a unitary school system wherein there are no black or white schools. You all have seen the usual order.

Now, any objection to that order? Of course give them all the reasonable time. And then wait for you all to submit your plan.

You tell me how long you think it will take, Mr. Wickham, so we can set a date down for a hearing on it should there be any exception. Hopefully there wouldn't be.

Let me just say this. I think we may get some help from court decisions in the next 30 days or so. But, you know, you can't tell how long the Court of Appeals will take to decide some of these.

Mr. Wickham: We would like a hearing, if necessary, some time during the week of May 18, if the Court could arrange it during that week.

We would hope to file, as we said in our statement to the Court, our plan no later than May 11.

[8] The Court: All right, sir.

Well, that is fine. I have no trouble with that. The problem at that time, I realize it takes time, although you have had some time to be working.

Mr. Chachkin: Your Honor, plaintiffs do have some difficulty in that regard.

I think this is going to get to what the issues are likely to be when a plan is filed.

Richmond School Board has announced, it has already sought the help of HEW in drafting a plan.

The Court: But this Court is not bound by whatever they draft. But I am delighted they are getting help from anybody.

*Excerpts from Transcript of Proceedings
of March 31, 1970*

Mr. Wickham: I might say, we are not bound too, Your Honor.

The Court: That's right.

Mr. Chachkin: No one is bound by HEW. We have particular difficulty in light of the President's statement in believing that the Department will undertake a thorough investigation of all possible remedies.

If the Richmond plan is filed on May 1st I doubt that we could be ready in 18 days to—

Mr. Wickham: 11.

The Court: May 11. As a matter of fact it gets [9] worse. They don't anticipate having it before May 11, Mr. Chachkin.

Let me say this. We will have to set a time now, that is all. I want to make it as easy as I can on the defendants because I realize the fantastic job they have to do. On the other hand I realize it is a job they should have been at since the New Kent decision.

I want to give the plaintiffs an opportunity to be heard. I don't want to rush them with submitting their plan. What is done is done. What hasn't been done hasn't been done. Nothing is gained by rushing the defendants in the submission of their plan.

Mr. Chachkin: I am suggesting a later plan, certainly not an earlier one, if that is possible in convenience to the Court. We anticipate that we will probably have to have some fairly detailed alternatives, perhaps we won't. I share the Court's enthusiasm that if we don't have to object in any way—

The Court: How much time do you think, based on your experience with school systems of this size, how much time do you think you will need after the plan is submitted

*Excerpts from Transcript of Proceedings
of March 31, 1970*

before you can file your exceptions? Never mind the hearing, now.

Mr. Chachkin: Well, I would say three weeks to [10] a month. We are going to start working now.

The Court: Let me say this. That is not unreasonable, but I am really going to expect that the plaintiffs chip in and work overtime, so to speak, in order to speed up the process, because the only one that gets hurt if we don't do it right are the children.

All right. I am going to order in this order, I will put it in the same order as the injunction, I am going to order that the plan be filed by, well, May 11 is a Monday, Mr. Wickham. Is that all right?

Mr. Wickham: Yes, sir.

The Court: Plan by May 11. That exceptions thereto be filed by June 8. And in the event there are exceptions, hearing will be had on June 19, subject to my getting the docket clear on that day. And if it is not on the 19th, it will be heard on Saturday the 20th.

I would ask that the exceptions be reasonably detailed, Mr. Ely and Mr. Chachkin, for this reason. I think if you do, certainly those portions of the plan that you may not have any exceptions to, I think the defendants would be reasonable in going ahead and making their preparation on the theory it is going to be approved. This is still an adversary system, and while I recognize my responsibility, if you all agree on something it would shock me that I didn't go along.

[11] And if you are reasonably specific on your exceptions it helps me as to the issues and it helps the defendants too because they may wish to file an amended plan. Sometimes they can accept them.

*Excerpts from Transcript of Proceedings
of March 31, 1970*

You may do that, incidentally, Mr. Wickham, after the exceptions are filed if you wish to file an amended one, quickly.

Any other matters we ought to take up or discuss, gentlemen? Any other issues? Any complicated issues that may be besides the word everybody doesn't want to talk about?

All right, let's see what the plan is.

Thank you very much. If the Court can be of any help I want to do it.

(The hearing in the above-entitled matter was concluded at five o'clock.)

I certify that the foregoing is a true and correct transcript.

/s/ GILBERT FRANK HALASZ
Gilbert Frank Halasz
Official Court Reporter

**Transmittal Letter for Desegregation Plan from HEW
to Superintendent L. D. Adams**

(Dated May 4, 1970)

OFFICE OF EDUCATION

May 4, 1970

Dr. Lucien D. Adams, Superintendent
Richmond City Schools
312 North 9th Street
Richmond, Virginia 23219

Dear Dr. Adams:

The staff of the Division of Equal Educational Opportunities is pleased to submit to you a desegregation plan for the Richmond City Schools. The plan has been prepared in response to your expressed desire to achieve the goal of a unitary system of public schools and in accordance with our interpretation of action which will most soundly achieve this objective.

We wish to express our appreciation for the excellent cooperation received from you and your staff.

Sincerely yours,

/s/ E. H. COOPER
E. H. Cooper
Program Officer
Equal Educational Opportunities
Title IV

**Excerpts from Transcript of Proceedings
of June 19, 1970**

[36] . . .

The Court: Dr. Little, do you recall any conversation or any suggestion that perhaps the freedom of choice plan would have to be changed by virtue of the United States Supreme Court decision prior to the [37] acquisition of these sites? Did you hear anybody say anything about it or do you think that the assumption was you ought to go on under the plan that you had because you felt it was a valid plan?

The Witness: Your Honor, we have discussed it. We had some serious problems with freedom of choice, freedom of choice plan. But in dealing with the Chesterfield County Schools, we did not feel that freedom of choice or attendance areas either would alter the basic place where youngsters would go to school.

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[39] . . .

Q. [Mr. Lucas] All right. This is a black area. When was this school planned? A. [Dr. Little] When was—

Q. Dove Street. When did you start planning this? A. We have been in one phase or the other of planning a school to take care of the overcrowded condition in this general area for about three years.

[40] We have had site acquisition problems, changing and resegregation of the entire neighborhood. This project

*Excerpts from Transcript of Proceedings
of June 19, 1970*

was—has been in concrete planning for about a year.

Q. Dr. Little, in planning new construction, does the Board or did your staff, when you were in that part of it, affirmatively take into account the effect of locating a new school in terms of whether or not it would be segregated, would it actually integrate the school system, or did you just consider proximity and the concentration of pupils?

A. I think I would have to say that we, that the School Board took into consideration both factors, but conditioning it on, in the elementary level, on reasonable walking distances of boys and girls from the concentration of population.

But what I am saying, I can recall the location of John Marshall High School, for example, on the extreme northern section of the city in anticipation of annexation that would tend in the long run to give us balances.

Location of John F. Kennedy on the extreme, as a matter of fact, into Chesterfield, into Henrico [41] County in anticipation of annexation to give us a balance, knowing that the concentration of blacks were in the core of the city and the whites were in the suburban area.

So, I think very definitely the School Board and the Administration has taken this into consideration, not just immediately but in many years past.

The Court: But, Dr. Little, I don't want to misinterpret your statement. I want to be sure that I am correct.

You say you felt the Board did consider the desegregation problem conditioning it on reasonable walking distances of students.

The Witness: Elementary students.

*Excerpts from Transcript of Proceedings
of June 19, 1970*

The Court: Elementary students.

The Witness: Elementary students.

The Court: Are you saying that, so far as you know, that no consideration was given to clustering, clustering, pairing?

The Witness: In the construction of new schools?

The Court: In the planning for them in their location, and so forth?

[42] The Witness: No, I don't recall any instance where that has occurred.

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[50]

Redirect Examination by Mr. Wickham:

Q. Dr. Little, in selection of the three sites for the elementary schools in the annexed territory, was any consideration of race given in selection of those sites? A. No, sir.

Q. How about the one on the North Side? A. No, sir.

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[78]

Q. [Mr. Lucas] Mr. Sullins, have you testified for School Boards in support of their plans for desegregation in opposition to the Plaintiff's plan of desegregation? A. I have been called as an expert witness by School Boards too, I am certain, to support their plans.

Q. Did you testify in support of the Norfolk percentage Negro plan in the proceedings last October? A. I did.

Q. And you were called as a witness on behalf of the School Board in that case; is that correct? A. Yes.

Q. Did you prepare plans of desegregation in Mississippi? A. Yes.

*Excerpts from Transcript of Proceedings
of June 19, 1970*

Q. What counties were they for? A. Hinds County, Madison County, and Canton Municipal Separate School District, I believe.

Q. And did you prepare to testify in those cases as to whether or not those plans could be implemented? [79]

A. Would you repeat that, please, sir? Would you repeat the question, please?

Q. Did you prepare to testify in those cases with respect to whether or not the plan of desegregation which you prepared or which your team prepared could be implemented in those districts? A. Yes.

Q. Did you execute an affidavit as to whether or not certain plans of desegregation were educationally sound and whether or not they could be implemented in connection with the Hinds County case which later became the Alexander case? A. Yes.

Q. Did you execute an affidavit which indicated that that plan could be implemented and was educationally sound? A. Yes.

Q. And did you subsequently execute a second affidavit indicating that you thought the plan should not be implemented and should be restudied after motions were filed by the United States in that case? A. I believe I executed only one affidavit and it was the latter situation.

Q. You have already testified you executed one [80] that said the plans could be implemented before the policy decision was made in H.E.W., and did you execute a second affidavit that indicated—

The Court: Now, he did not testify to that, Mr. Lucas, in fairness.

*Excerpts from Transcript of Proceedings
of June 19, 1970*

Now, he said that he had prepared an affidavit that the plan was sound. He did not say anything about before the policy.

Mr. Lucas: I believe he also said, Your Honor, it could be implemented; is that correct?

The Court: That is correct.

Q. It was sound and it could be implemented, is that right? A. I prepared one affidavit for the Hinds County situation in which I stated that the plan was educationally sound, but that it should be—that the implementation of it should be delayed.

Q. Did you previously make a recommendation that it could be implemented? A. Yes, over the two-year period that my plan called for.

Q. Then you subsequently made one that it should be delayed, is that correct, or you testified [81] that it should be delayed and restudied? A. In the particular Hinds County situation I did not recommend that Hinds County plan be delayed over the two-year period—I beg your pardon—to correct the statement.

The Court: All right, sir.

A. The affidavit which I submitted in Hinds County called for a request, I believe, for a delay of the implementation of the Hinds County plan until the following school year. The plan itself was a two-year projection. And I think my affidavit called for a delay until September of the following year, or at least a delay. I don't recall the exact month of delay.

Q. Had you not previously recommended that the plan be implemented during that school year, that it not be de-

*Excerpts from Transcript of Proceedings
of June 19, 1970*

layed? Had that not been part of your original recommendation in the case? A. The plan that was originally prepared, we were instructed to prepare plans for implementation in September.

Q. And you did so prepare plans to be implemented in September in a two-year stage; is that correct? [82] A. That is correct.

Q. And then you subsequently executed an affidavit, after some proceedings, and/or testified, perhaps both, I am not sure, that the plan should not be implemented in September; it should be delayed? A. That is correct, sir.

Q. And you were appearing as a witness for the United States at that time? A. That is correct, sir.

Q. And what position did you hold with the United States Office of Education at that time? A. The same position I now hold.

Q. You did not receive a promotion sometime during that period, Doctor? A. I did not, sir, except the usual in-grade promotion that comes at the end of one year if your services have been satisfactory.

Q. And what is your definition of a desegregated school, Dr. Sullins? A. A desegregated school in my opinion is one in which children are assigned to a specific school without regard to race, color or creed.

Q. A school that is 100 percent black is a [83] desegregated school, Dr. Sullins? A. In my opinion, if the faculty of that school is desegregated, there would be certain circumstances, I believe, where a school could be—the interpretation of desegregated or unitary could be placed upon that school system.

Q. Is it your interpretation, Doctor, as an expert, that a school with 100 percent black enrollment in a system

*Excerpts from Transcript of Proceedings
of June 19, 1970*

where there are whites in the system is a desegregated school? A. In my own opinion, yes.

Mr. Lucas: I submit the witness is not qualified, Your Honor, as an expert in desegregation.

The Court: According to what the witness has testified, according to the weight of the evidence, I am not satisfied that the qualifications are sufficient, I will be frank with you. But I am going to let him testify as an expert.

Go ahead and examine this witness.

Let me ask you one other question that just prompts it.

The innuendoes, Dr. Sullins, in fairness, [84] are that you recommended one thing and then later changed your mind.

Now, was that based on your own intellectual determinations, or was it based on a policy change by some Government office?

The Witness: It was based on a policy change, sir.

The Court: Now, did this plan—I presume that you had prepared this plan?

The Witness: Yes, sir.

The Court: Did you prepare it on a policy basis?

The Witness: As much as we have to operate under, yes, sir.

The Court: And what you are really doing, you are testifying to the policy of H.E.W.; is that correct, as distinguished from your capabilities as an expert on desegregation?

The Witness: Yes, sir. Yes, sir.

*Excerpts from Transcript of Proceedings
of June 19, 1970*

The Court: All right. I take you as an expert on H.E.W. policy and for no other purpose.

【86】 . . .

Q. [Mr. Wickham] Dr. Sullins, what was the purpose, or your purpose, or your team's purpose in assisting in the preparation of a desegregation plan for the City of 【87】 Richmond? A. To develop a desegregation plan which would provide for a unitary school system with as much integration, desegregation as possible.

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【89】 . . .

Q. [Mr. Wickham] All right. In what ways did the school authorities help or cooperate with you and your team, Dr. Sullins? A. [Mr. Sullins] They furnished all the information we requested, information that goes on the building forms, special programs, the data that I have just mentioned.

Q. What guidelines are laid down by H.E.W. for you to follow in formulating a desegregation plan? A. There are no specific written guidelines 【90】 which we follow. The policies have changed, the unwritten policies have changed in the last year or two as far as the approach to desegregation plans are concerned.

There is more emphasis now upon the neighborhood school concept as the basis for a development of a plan.

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【118】 . . .

Cross-Examination by Mr. Allen:

Q. Dr. Sullins, I would at least like to get straight on one thing I did not understand on cross-examination.

*Excerpts from Transcript of Proceedings
of June 19, 1970*

What specifically is the policy of H.E.W. toward transportation? A. Utilize the transportation that is currently in the system to desegregate as far as possible, but not to burden a school system with additional cost of busses and transportation that wherein the funds might be better utilized to be spent on an educational program rather than transporting children from one end of the city or county to the other.

Q. So this would involve using the present public transportation facilities plus the school system's existing busses, but not require them to buy any more busses or not to make unreasonable requirements upon them to buy any more busses, which is it? A. As far as my limited experience is concerned, [119] and I can only speak for the new plans that I have taken to the ad hoc committee, there has been no requirement that the school system be forced to add additional busses to the school system to desegregate the system.

Q. Like none? A. Yes, none.

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[121] The Court: Or from anywhere else? From the School Board, did they tell you, "This is what we want to do"?

The Witness [Mr. Sullins]: No, sir.

The Court: What did they tell you to do?

The Witness: The School Board? Nothing. I did not meet with the School Board, sir, until the plan had been developed in almost final form.

The Court: Well, I meant school authorities. What did they tell you? What did they tell you the Board wanted?

The Witness: They did not tell me what the Board wanted. I did not inquire as to the in-put.

*Excerpts from Transcript of Proceedings
of June 19, 1970*

The Court: What did they come in and ask you to do, that they wanted you to do at all?

The Witness: Except to try our best to meet the directive of the Court Order and they gave me the Court Order.

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[220] Q. [Mr. Wickham] The plan that has been presented here this morning and filed as Defendants Exhibit 1, has this plan been approved and adopted by the School Board of the city of Richmond? **A.** [Dr. Adams] It has.

Q. Will you relate briefly the circumstances leading up to this approval? **A.** We received a motion from the Court on March the 11th, and on the 19th the School Board instructed me to request H.E.W. to assist us in preparing a plan that would be in compliance with the law; and I did so by letter to Mr. Cooper in Charlottesville.

The team came in early in April and presented a plan to the School Board on April the 30th.

On May the 6th, the School Board meeting with the Clerk, attorneys, and myself, unanimously approved this plan as one to be submitted.

It was submitted on May the 11th to the Court.

Q. How many members do you have on your School Board in the city of Richmond? **A.** Five.

[221] Q. Are any of these members of the Negra race? **A.** Two of the five are.

Q. You are familiar with the fact that the Defendants reported to the Court and stated that the geographic zoning plan for the assignment of pupils, as presented by H.E.W., had been approved.

*Excerpts from Transcript of Proceedings
of June 19, 1970*

What exceptions to the school plan, as presented by H.E.W., were made at that time? A. We asked in the plan two exceptions.

One was that those seniors who were in our school as of June of this year, 1970, those juniors who would graduate next year and be seniors next year and who were expected to graduate would be allowed to remain in their schools, since this is a most important function in their lives and they attach great importance to graduating from the schools they attended, and we asked that written request on the part of parents that seniors be allowed to remain in high schools during the 1970-71 school year as the first exception.

Q. What was the second exception? A. The second exception was that we asked that in the case of the integration or desegregation of the entire staff, the faculties of schools, that some [222] exception be made.

The School Board approved the idea entirely in principle; but felt that this much change during the first year would work an undue hardship, not only in terms of time, and the School Board asked that a variance of 20 percent from the recommended percentage or recommended ratio be given for the '70-'71 year only.

Q. What is your ratio, the faculty ratio as to the white and black teachers? A. When we add the annexed area teachers to our staff, the faculty will be about 50 percent white and 50 percent black.

Q. How much integration of the faculties do you have this current school year? A. We have a total of some— it is close to 250 counting the part-time people in the schools who are working in schools of the opposite race. This is an approximate number. I don't have the exact

*Excerpts from Transcript of Proceedings
of June 19, 1970*

number. That includes full-time teachers and part-time teachers and principals, and so on.

Q. Over the past two or three years, how many teachers have ben assigned to schools of the opposite race? [223]

A. Approximately 500 since 1966.

Q. Why specifically are you asking the Court for the coming school year to give you a 20 percent leeway in the assignment of your teachers? A. Well, I think we have a number of problems in the assignment of teachers.

Number one is the time to make the necessary arrangements and study the situation. That is the primary consideration because we run into problems of certification of getting the right teacher in the right place certified for the right subject.

We also recognize that the faculties of these schools, many of them have been built up over a long number of years and are very important to the ongoing and continuity of programs in schools, and to make a major change in a short period of time, we feel, would seriously impair the continuity of programs that exist.

Q. Do you feel that you will actually obtain a fifty-fifty ratio by September of 1970? A. I think it would be highly problematical in being able to actually obtain that many, and that, of course, is one of the reasons we asked for some variance of these during the first year.

[224] The Court: While we are on that, Mr. Adams, tell me why.

The Witness: Why we asked for the 20—

The Court: No, no. I know why you asked for the reduction.

*Excerpts from Transcript of Proceedings
of June 19, 1970*

Why would you be unable to obtain it? Don't your teachers under contract teach where you tell them to teach?

The Witness: The teachers are under contract; that is, many of our teachers are. Because of the, I think the uncertainty this year, we probably have a number of teachers that have not yet signed their contracts. I am not sure that those would come back if they were moved.

I know that you are aware of the fact that when a teacher has been in a school a long time they establish a great deal of attachment to that school and resist moving from it, and this has nothing to do with race whatever.

The Court: I am fully cognizant of that, Mr. Adams. This will be the first [225] Order that I have granted in which I have directed a specific proportion of teachers.

The Witness: We have many teachers who have bought homes close to their schools so that they could be there, and I am just not at all sure that many of those teachers would move to other schools if we asked them to.

We have used all the means that we know how during the past four years to get teachers to move from one school to the other short of making it a condition of employment.

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[243] . . .

The Court: It is not H.E.W.'s responsibility. It is the School Board's responsibility.

Mr. Wickham: We understand that, Your Honor.

*Excerpts from Transcript of Proceedings
of June 19, 1970*

The Court: Nobody else's.

Mr. Wickham: We have adopted this plan, Your Honor.

The Court: All right, sir.

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【253】

Q. [Mr. Lucas] You say this plan was adopted by the School Board? A. [Dr. Adams] Yes.

Q. Was that adopted at a public meeting or a secret meeting of the Board? A. It was adopted at the meeting with their attorneys.

Q. Is there anything in the minutes, in the official minutes of the Board of Education of the city of Richmond that indicates this plan was ever adopted by the system? A. Not in the minutes.

Mr. Wickham: Your Honor please, as Attorney for the School Board, I am authorized to state to this Court that the School Board and the school authorities have 【254】 adopted the plan that we here present.

The Court: Your representation is sufficient.

Q. Nothing that appears in the minutes; is that correct? A. Correct.

Q. How many alternative plans were considered by the Board of Education before deciding upon this plan as the plan it would adopt for presentation to the Court? A. No alternative plan.

Q. Were there any studies done by the Board or members of the staff indicating the possibilities of desegregation using transportation or any other technique? A. Not to my knowledge in terms of formulating a plan; that is, I am sure there were discussions of members of the staff of

*Excerpts from Transcript of Proceedings
of June 19, 1970*

possibilities, and so on, but no plan was adopted or—and so forth.

Q. Mr. Adams, you were in Court this morning when Dr. Sullins testified, were you not? A. Yes.

Q. And he testified about a rough plan that he drew up that would provide for racial balance and [255] he came up with an estimate of the number of students to be bussed and the number of busses to be used.

Was this developed in the material and information furnished by the Board of Education to the H.E.W. team? A. I don't know. I don't know anything about his development or what he developed it from. I have no knowledge of that whatever.

Q. Does the Board have its own Research Department? A. Yes.

Q. Does their Research Department have access to all of the statistical data in the system? A. Yes.

Q. What type of technological aids does the Department have to use in school planning? A. (No answer.)

Q. Does it have its own computers? A. The Research Department, no.

Q. Does the School Board have its own computer? A. Yes.

Q. And how long have you had a computer? A. I don't know. For a number of years.

[256] Q. Didn't you furnish answers to interrogatories with computer print-out of all the information on the faculty? A. Yes.

Q. And haven't you furnished information to the Richmond Redevelopment Housing Authority concerning pupil enrollment, pupil statistics and their locations within the system based upon computer print-outs? A. I don't know.

*Excerpts from Transcript of Proceedings
of June 19, 1970*

Q. Would that be possible with the existing facilities that you have? A. I presume it would.

* * * * *

[262] * * *

Q. [Mr. Lukas] You say in your contracts at the present time you do not make the acceptance of assignment to a school at the election of the School Board as a condition of employment? A. [Dr. Adams] That we do not sign contracts for a particular school. That was not quite what I was referring to.

I said that in transferring teachers from one school to another one of the opposite race, we had not made that a condition of the contract. You understand—

The Court: Let me get it straight. Your teacher contracts call for you to assign them wherever you decide to assign?

The Witness: That is correct. What I [263] was referring to, the efforts that we have made to get teachers to transfer from schools of one race to one of predominantly the other race, and we have not forced them to do it under—

The Court: You have not said, "If you don't go, don't sign our contract"?

The Witness: If you don't, you don't have a contract. This is what I was referring to.

* * * * *

[267] * * *

Q. Has the Board put any sort of similar effort into desegregating the schools as to be compared to your effort to reduce the teacher-pupil ratio- A. The schools

*Excerpts from Transcript of Proceedings
of June 19, 1970*

since '66 have been operating under a freedom of choice plan in which we had to be quite careful in not insisting one way or the other in terms of children, and we were frequently accused anyway of trying to keep people in a school or not. We had to really be very objective in what we did.

Q. Do you feel that you as an Administrator and the Board have an affirmative duty to eliminate [268] the racial identity of schools in the system? A. Yes.

* * * * *

[304] * * *

The Court: In that connection, was any studies or how many studies were made as to how many of the students who have exercised their right of freedom of choice actually use either public transportation or private transportation, stationwagons, car pools?

The Witness [Dr. Adams]: We have not made that determination, we have not made a study of it. I don't know the answer to that.

**Excerpts from Transcript of Proceedings
of June 20, 1970**

[320] [The Court] That is the point that I think is so very, very material. I am not at all sure that the defendants, and I would not want to put it on them if that is not their admitted position. I don't know. But it seems to me that that has to be. If free choice didn't work, it didn't work, and if the defendants admit they have to do something else, and they admit it didn't work because they were operating segregated schools which is constitutionally impermissible.

It is also apparent that the Plan that was tendered was done so in an effort to correct the results of their conceded segregation, and it is obvious under the law of this circuit that where a School Board operates a system which is violative of constitutional requirements, the burden is on the School Board to explore every reasonable method of desegregation, including rezoning, pairing, grouping, clustering, school consolidation, transportation, including majority-minority transfer plan.

[321] I am not sure that the plan that is tendered does not contemplate a free transfer plan for primarily those of the Negro race only. I believe that is it. I am not sure that's constitutionally permissible.

In short, the Board is under a duty to utilize all reasonable means to dismantle the school system to eliminate racial characteristics.

The evidence before the Court is that all facets were not considered. If the defendants concede that the failure of free choice, if they agree that the Court's statements are accurate, were created by something more than just residential patterns, and it seems to me that it would have to be or they would not admit that the free choice did not work.

**Excerpts from Transcript of Proceedings
of June 25, 1970**

[1122] . . .

Q. [Mr. Lucas] Dr. Little, assuming transportation of pupils, is there any way to achieve what you consider to be, as an educator, an optimum of desegregation in the Richmond area? A. [Dr. Little] In the Richmond area, yes.

Q. How would you do that? A. It would involve the involvement of a larger area than the present city boundaries of the city of Richmond.

Q. Are you talking about Henrico County, Chesterfield County or both? A. Henrico County, Chesterfield County, and the [1123] possibility of the general metropolitan area, maybe bordering on, in other counties other than Henrico and Chesterfield. Basically, the problem could be solved within the city of Richmond, Henrico and Chesterfield Counties.

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[1126] . . .

Q. [Mr. Lucas] Dr. Little, I notice that the Research Department has prepared a lot of data, a lot of maps and exhibits, and so forth.

Do you all have computer processing? A. [Dr. Little] Yes, sir.

The Court: We have been through this, Mr. Lucas, I recall.

Mr. Lucas: Your Honor, I have only one question that I really want to find out, if they have devoted comparable study to the possibilities of devising or feasibility of a plan involving transportation.

Q. Has that ever been done? A. Mr. Lucas, I have given a great deal of consideration personally to the involvement

*Excerpts from Transcript of Proceedings
of June 25, 1970*

of transportation and the logistics, the complications, the numbers and the cost, yes, sir.

Q. Now, I don't mean a formal plan, but have you ever performed written—is it in writing anywhere in the last couple of years, a study of the comparable skills and techniques, or the numbers, [1127] how many busses that will be needed in order to desegregate within Richmond itself? A. Yes. Sometime ago I asked my staff to give me an estimate on the number of children that would have to be moved from our high schools, from our schools as reflected by the enrollments of last September, how many would have to be moved out and how many would have to be moved in to gain a balance directly in proportion with the racial composition of that level of instruction, elementary, junior and senior high school.

Q. You said you used the enrollments of this past September? A. The enrollments and school organization of last September.

Q. Did you figure out how many busses you would need? A. I made an estimate of the number of busses, yes, sir.

**Excerpts from Transcript of Proceedings
of June 26, 1970**

[1190] The Court: Well, gentlemen, I think it has been perfectly obvious from the very beginning, as the case unfolded, that the School Board has not borne the burden placed upon it by the law. I hope we will not lose sight of the fact that the burden is the School Board's burden, not the Plaintiffs' burden.

The Court had real fear, so to speak, from the very first witness, that the School Board's Plan could not be approved.

In the first place, it was formulated without regard to what the law of this Circuit requires. The witness testified, Dr. Sullins, that it was their policy to just disregard any transportation at all. He also said that it was, as I understood at one point, it was his policy, at least, to attempt to desegregate schools without considering race. How do you ever do that, I don't know. To desegregate, you have got to give consideration to race. Utterly ridiculous.

Now, it is the School Board's burden in devising its plan and it is the Court's **[1191]** responsibility in considering whether the plan is adequate, to explore every reasonable method of desegregation, including rezoning, pairing, grouping, school consolidation, transportation, majority-minority transfer plans, satellite zoning. In short, in this Circuit, it is necessary to consider any and all reasonable means to dismantle the dual system and eliminate the racial characteristics of the schools.

The citations are so obvious, *Swan v. Charlotte-Mecklenburg*; *Green v. School Board of the City of Roanoke*; the *Franklin* case; the *Southampton* case; *Brewer v. Norfolk*.

*Excerpts from Transcript of Proceedings
of June 26, 1970*

The Swan case, I think, is the, certainly the leading case in this Circuit, the first one to come down in which it faced this busing business to some extent.

This Court is bound in determining the use of transportation or zoning or clustering, or anything else, to use the rule of reason, which may not appear to be very definitive, and it is based, I think, upon the premise that everybody is going to act in good faith. [1192] Now, the only statement that I can find with reference to the Swan case considering the neighborhood school concept is the statements of Judges Sobeloff and Winter in their concurring opinion in the Brewer vs. Norfolk case wherein they say, that the Court should not tolerate any scheme or principle, however characterized, that is erected upon or having the effect of preserving the dual system. This applies to the neighborhood school concept, a shibboleth decisively rejected by this Court in Swan as an impediment to the performance of the duty to desegregate.

Now, that is not a dissenting opinion. That is part of the majority opinion, talking about the Swan case.

The School Board's plan as contemplated fails for another reason. It fails to do what is required to do in reference to the faculty.

Now, with respect to the faculty, teachers in this Circuit must be assigned so that the ratio of black teachers to white [1193] teachers in each school will be approximately the same as the ratio of black teachers to white teachers in the entire school system, which I think Mr. Adams destroys. As a

*Excerpts from Transcript of Proceedings
of June 26, 1970*

practical matter, your hope of the twenty percent variance.

I will say this, it is this Court's opinion that, as binding as that statement appears, I think I can take it in context with the rule of reason that is contemplated in the Swan case, that there may be very, very special exceptional circumstances which the Court will consider when the plan comes in, but it cannot be any blanket ten percent or four percent or three percent, special, special circumstances.

Gentlemen, the Court is going to require in its ultimate requirements, that the dual system here has been perpetuated by virtue of the fact that segregation has been sponsored by the local, state and federal authorities, not—Negroes live where they live because they have no other choice. The laws have been such. I don't think it is a choice now, [1194] and I would ask you to keep that in mind in preparing your new plan because it may have an effect as to how far the School Board has to go.

The proposed plan by HEW, and adopted by the School Board, according to my calculations, subject to being corrected, because my mathematics are not the greatest, it would appear that East End, for example, out of sixteen schools, they were going to leave thirteen schools with 93 percent or more Negro. One school would have had 88 percent Negro; four schools would have had 100 percent Negro, and it appears that only two, Fulton and Webster-Davis, appears to have been reasonably desegregated, and in that case they would have had 36 percent roughly of white as to 63, almost 64 percent Negro.

*Excerpts from Transcript of Proceedings
of June 26, 1970*

In the annexed area, their plan contemplated out of ten schools that there would be ten with 89 percent or better with the white race, and two with 100 percent white race. The most, highest percentage of [1195] Negroes in the annexed area, as contemplated by the plan submitted, Negro, 5.1 percent against 94.9 percent white. I think the best way to describe that, gentlemen, in the situation—let's finish—in the West End on the north side there were, let's see, one school would have had 2.8 percent white as against 97.2 percent Negro. There are 1, 2, 3, three schools would have had 100 percent Negro.

Another school, Norrell and Norrell Annex, would have had 4.4 percent white; Graves Jr., would have had 7.5 percent white; Maggie Walker, 9.1 percent white.

The South Side appears to have been one of the other schools more reasonable in getting closer to working it out, but even then the whites predominate.

Now, I am not giving a definite ruling because I think the School Board ought to have its opportunity to attempt to come up with a plan. I don't know of any instances, gentlemen—I wish everybody would keep this in mind—where the Court has drafted a plan. [1196] Now it may be. I am certainly reluctant to do it. I don't want to. I don't think you all ought to put it on me.

What has happened, as a practical matter, is that Courts in other areas, to my knowledge, where they cannot find a plan approved by the School Board, they have arbitrarily taken the Plaintiffs' plan.

*Excerpts from Transcript of Proceedings
of June 26, 1970*

In reference to the Plaintiffs' plan, the Plaintiffs' witness very frankly admitted that there could be improvements made upon it. I don't care how you add the figures, there are going to be at least 9,000 children who are going to go by transportation next year if we were not even in litigation, annexed or voluntary, or what. I suspect there is not as much walking as the record might indicate, and I am not saying that 18,000 people being bussed is a reasonable number, but it is not as extreme as it would sound at first blush when you take into consideration how many are already being transported.

The School Board must realize, and I am [1197] sure counsel all realize it—oh, I have one other point—I don't think without making a definitive ruling that .2 or .3 of one percent white children in a school with 99.7 Negro children, or .3 of one percent of the Negro children in a school with 99.7 percent is an integrated school. That is sprinkling. I would think that if that had to come to pass, we would be better off to have it 100 percent one race.

I have already expressed myself on what the HEW plan did to Mr. Allen's clients. Gerrymandering, just to take 45 white children, that is not integrating schools. That is sprinkling.

I hope that the School Board now has a better idea of where they can go. I think they have got some benefit from all of this testimony here, but we must bear in mind it is their responsibility, they are the ones under the law. HEW, I am afraid we cannot get any help from them, gentlemen, if their policies are such that it conflicts with the [1198] constitutional

*Excerpts from Transcript of Proceedings
of June 26, 1970*

requirements, and Dr. Sullins said that it did. I am sure that the Courts, or, at least my view of the Courts are that we ought to attempt to cooperate and follow the Executive Branch as best we can, but when it conflicts with constitutional requirements, trial judges have no choice but to follow their appellate courts and I intend to do it, as unpopular as it may be. The public may not understand it but I think the Bar understands and I do. I am going to do it. I think we can work it out. I have every hope. I am perfectly willing to look at alternative plans. It may be traumatic but we might just as well face it. It's got to be done. We have had several years, and I will not dwell on it, but it has been several years since the New Kent case and nothing has been done. Nothing seems to be done until somebody comes in and creates litigation. So the problems and the hard work are really things of our own making.

All right, gentlemen, I am going to [1199] reject the plan as submitted, and I am going to take the Plaintiffs' plan under advisement and I am not going to put that into effect at this stage, and hopefully I won't have to put it in effect at all. But I will ask the School Board to submit the plan to this Court on or before July 27, 1970. And you might look at the order entered by Judge Hoffman, Mr. Wickham and Mr. Wimbish, in the Norfolk case in which he suggests that the plan may be based on suggestions made by the government's expert witness, in that case, Dr. Steele.

Had I been able to find an expert that I thought had not been on one side or the other, I don't mind

Script of Proceedings

Excerpts from Trans. 26, 1970

of June

would have gotten, and I still telling you the Court it is kind of hard to find an may, if I have to, bustified for either the School expert who hasn't tACP plaintiffs. That doesn't Board or for the NACP perfectly honest, but it is mean that they are ed if we can, I think.

something to be avoided if you have to do [1200] and

Now, you know wh exceptions to the plan by the I will ask you that an exceptions be filed by August 3rd. Plaintiffs or Interv exceptions will be conducted Hearings on any such on Friday, August 7.

Now, I said yesterday that I wanted findings of fact, the proposed findings of fact. To some extent it may be a little difficult without a plan it looks like the Court can approve or without the School Board's additional plan, but I still think it can be done before the plan is concluded, though it may not be necessary to do it in the eight days that I have suggested. Maybe that time can better be spent by Mr. Wickham and Mr. Wimbish in assisting the School Board in conforming to the requirements of the law. So I will ask you to have them within—what do you think is reasonable, Mr. Wickham?

Mr. Wickham: Your Honor please, I suggest a week prior to submission of the School Board's next plan.

The Court: All right, that will be fine.

[1201] Mr. Wickham: July 20th or what date?

The Court: Well, do it on Monday. That's right, the 20th. Would you do that, gentlemen, for me?

*Excerpts from Transcript of Proceedings
of June 26, 1970*

I want to thank—I won't say it to you again, Mr. Lucas. The last time I told you how appreciative the Court was, you lost your case completely. I won't put that on you this time. I am appreciative of the help that all counsel have given, including the intervenors.

I know it is a lot of work for the School Board, but I think you can do it. You have to do it. We have no choice. That's all there is to it.

All right, gentlemen.

Mr. Gray: Judge, before you stop, would you indulge me a moment before you adjourn court?

The Court: Sure. You are the real expert on desegregation.

Mr. Gray: Thank you, Your Honor.

The Court: All right.

Now, one other matter, gentlemen. I have [1202] concluded, after hearing the testimony of Mr. Kiepper yesterday, that it is imperative that the members of the City Council be joined as party defendants to this action here.

Federal Rule 21 provides that parties may be dropped or added by order of the Court on motion of any party that should be initiated at any stage of the action on such terms as are just.

Whatever members of the School Board have to do they are going to have to have the cooperation of the City Council, and that's all there is to it. And if nothing else the case will attract their attention, I think, more vividly if they are party defendants.

So in accordance with Rule 21, I am going to make them party defendants. See *Halladay v. Verschoor*, 381 F.2d 100, is my authority for it.

*Excerpts from Transcript of Proceedings
of June 26, 1970*

All right, gentlemen, thank you very much.

The Court will take a brief recess [1203] before going on with my other docket.

Mr. Lucas: Your Honor, there is one other matter—in view of some of the testimony about the time span for acquiring transportation facilities and the availability of possibly some busses from Chesterfield County, we have not gone through, we would like to suggest to the Court some sort of order like Carter or like Medford requiring the Board to be prepared to perform in terms of providing transportation, whether that requires taking bids—

The Court: Well, thank you, Mr. Lucas, for your suggestion, but I don't think I am going to adopt it. I have already suggested that counsel for the School Board examine the order entered in the Brewer case, and in that order, I might add, the School Board was directed to contract with VTC for the transportation of students.

I will say this: I do not think the schools in the City of Richmond can open until a plan that is acceptable by the Court has been adopted, and the plan must be in effect [1204] when schools open for the fall term.

Mr. Lucas: Thank you, Your Honor.

The Court: Recess the court.

(RECESS)

(ADJOURNMENT)

Motion for Attorney's Fees, etc.

(Filed July 2, 1970)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
CIVIL ACTION No. 3353

CAROLYN BRADLEY and MICHAEL BRADLEY,
infants, etc., *et al.*,

vs.

THE SCHOOL BOARD OF THE CITY OF
RICHMOND, VIRGINIA, *et al.*

MOTION

Plaintiffs, by their undersigned counsel, respectfully pray that this Court enter an Order directing the defendants to take all necessary steps to implement a plan of desegregation which provides for the elimination of the racial identity of each school in the Richmond public school system, effective with the commencement of the 1970-71 school year, including but not limited to, the provision of adequate transportation facilities, by contract or purchase, securing the necessary capability and capacity for the transportation of all pupils eligible, in accordance with such non-racial transportation standards as the Board shall adopt, for such transportation to the schools to which they may be assigned under such a plan, and the use of route plan-

Motion for Attorney's Fees, etc.

ning assistance from the state Department of Education;

Plaintiffs further pray that this Court enter an Order directing the defendants to take no steps which are inconsistent with or which will tend to prejudice or delay a schedule to implement, effective for the 1970-71 school year, the desegregation plan proposed by the plaintiffs, which this Court has taken under advisement;

Plaintiffs further respectfully pray that this Court direct that all steps necessary to provide adequate funds for the constitutional operation of the Richmond public schools effective for the 1970-71 school year be taken, including but not limited to the transfer of funds from present capital budget categories for planned construction or other capital improvements, to operating budget categories, the securing of additional appropriations to operating budget categories, the application for assistance from the Virginia State Department of Education, application for all available federal funds, including but not limited to transfer of Title I allotments from other programs to meet transportation requirements, as well as for such assistance as may be available or as may become available under the Civil Rights Act of 1964;

Plaintiffs further pray that in light of the burden upon plaintiffs and the cost and disbursements required in this action, the Court make an interim award of all out-of-pocket costs incurred by the plaintiffs since the filing of the Motion for Further Relief, said costs to be certified to the Court, as well as attorneys' fees in an amount to be determined by the payment made or to be made by the school board to special counsel retained by it in this cause.

In support of this Motion, plaintiffs respectfully refer the Court to the decision of the United States Supreme Court in *Carter v. West Feliciana Parish School Bd.*, 396

Motion for Attorney's Fees, etc.

U.S. 226 (1969); *CF. Alexander v. Holmes County Bd. of Education*, 396 U.S. 19 (1969); *Nesbit v. Statesville City Bd. of Education*, No. 13229 (4th Cir., Dec. 2, 1969); *Stanley v. Darlington County School Dist.*, No. 13,904 (4th Cir., Jan. 16, 1970); *Swann v. Charlotte-Mecklenburg Bd. of Education*, — U.S. — (June 29, 1970), and to the Memorandum of Points and Authorities previously filed herein.

Respectfully submitted,

/s/ NORMAN J. CHACHKIN

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District Court's Letter to Counsel

(Dated July 6, 1970)

UNITED STATES DISTRICT COURT

Eastern District of Virginia

Richmond, Virginia 23219

July 6, 1970

Chambers of
ROBERT R. MERHIGE, Jr.
District Judge

M. Ralph Page, Esquire
420 North 1st Street
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Re: Carolyn Bradley and Michael Bradley, etc., et al. v.
The School Board of the City of Richmond, Virginia,
et al. Civil Action No. 3353

Gentlemen:

Your motion filed July 2, 1970, in re the above styled matter, has been brought to the attention of the Court, and unless I am requested to do otherwise by counsel for the defendants, no action will be taken on this motion until the defendants have been given an opportunity to be heard thereon.

It may be appropriate, however, for the Court to suggest to all counsel that heretofore in cases of this nature it has been the Court's practice to request counsel to attempt to come to a understanding in reference to fees prior to the

District Court's letter to Counsel

Court taking any action thereon. In any event, it would appear that if the parties cannot agree in reference to that issue, a ruling on same ought not to be had until after a plan has been approved.

It also occurs to the Court to suggest that it ought to be unnecessary for the Court to enter any order as suggested by Paragraph 2 of your motion, for I am satisfied that counsel have advised their clients of the law as enunciated by the Court of Appeals of this Circuit as well as by the United States Supreme Court in the *Alexander* case, to the effect that there can be no further delay in the establishment of a unitary school system. It would appear inappropriate, in any event, for the Court to direct the manner in which the defendants are to comply with the constitutional requirements.

I am sure that all counsel are aware of the fact that this Court has not to date prepared any plan of desegregation, and does not intend to do so in this instance. That burden rests upon the school board. Obviously if the school board cannot file a plan which is constitutionally viable, and another plan has been filed by either the plaintiffs or intervenors which is constitutionally viable, the Court has little choice but to approve that which is required under the law. Paragraph 3 of your pending motion suggests that the Court enter certain orders directing the defendants, in essence, in the manner in which they are to approach the immediate problem. I do not think this is necessary, although it is certainly appropriate for the Court to make suggestions.

It appears to me that the Court's findings from the bench were sufficient to suggest to all counsel, and to the defendants in particular, that they explore all reasonable means to the end that their proposed plan conforms to the requirements of law. I know of no stronger language than that stated by

District Court's letter to Counsel

the United States Supreme Court in the *New Kent* case, wherein the Court stated that the burden is upon the school board to take "whatever steps are necessary."

I am sure all parties recognize that the burden upon the school board in the submission of any plan is such that any plan which cannot be shown to be one which furthers conversion to a unitary, non-racial, non-discriminatory system must be held unacceptable.

The Court, of its own knowledge, recognizes that we are rapidly approaching a state-wide system of school districts which conform to the requirements of law.

I am hopeful and confident that the defendants are exploring every reasonable method to reach the ultimate goal. I am sure all recognize that the manner in which desegregation is to be achieved is subordinate to the effectiveness of any particular method or methods of achieving it. It is obvious that the United States Supreme Court tests the plans by their effectiveness.

This Court is not so insulated as not to be cognizant of some of the problems the school board is facing, including perhaps community opposition. As the Court stated from the bench, as traumatic as it may be, it must be done. No opposition can serve to prevent vindication of constitutional rights.

I am sure that all counsel are appreciative of the fact that the Court stands ready to assist in any manner consistent with its obligations, to the end that a plan constitutionally acceptable is formulated.

I feel confident that the defendants will utilize any assistance they may deem appropriate, including help from the Health, Education and Welfare and the State Board of Education.

It may be that it would be appropriate for the defendant

District Court's letter to Counsel

school board to discuss with the appropriate officers of the contiguous counties as to the feasibility or possibility of consolidation of school districts, all of which may tend to assist them in their obligation. They may well determine to look at the prospects of a "feeder" system, consolidation, pairing, zoning, etc.

In spite of the guidelines afforded by our Circuit Court of Appeals and the United States Supreme Court, there are still many practical problems left open, as heretofore stated, including to what extent school districts and zones may or must be altered as a constitutional matter. A study of the cases shows almost limitless facets of study engaged in by the various school authorities throughout the country in attempting to achieve the necessary results. I have the utmost confidence and hope that the instant defendants will study all reasonable methods prior to their submission of a plan.

This letter is not to be construed as a formal ruling in any manner whatsoever on your pending motion. I realize there are cases in which the Courts have granted the interim relief requested by you in your motion; cases by which this Court may well be bound. You may be assured that every consideration will be given to your motion at such time as the Court deems it appropriate.

I felt, however, that this might be an appropriate time for the Court, consistent with its obligations, to weigh the ultimate suggestions in light of any alternatives which may appear as feasible and more promising in effectiveness, to remind all parties that the Court did not intend its statements from the bench to be limiting in any manner whatsoever as to the methods to be studied by the defendant school board.

It may be appropriate at this time to advise all counsel that there has been at least one informal motion for leave to

District Court's letter to Counsel

file a brief *amicus curiae*, and since the Court cannot at this time conceive of any reason why any additional intervenors would be permitted, I likewise can see no reason why the Court should not be most liberal in granting permission to file briefs *amicus curiae* and an order so stating will be this day entered.

Thanking you, I am

Very truly yours,

(s) Robert R. Merhige, Jr.,
Robert R. Merhige, Jr.
United States District Judge

cc: All counsel of record

Submission of Interim Plan by Richmond School Board
(Filed July 23, 1970)

Pursuant to the Court's order of June 26, 1970, the School Board of the City of Richmond, Virginia, has adopted and herewith submits its plan for the operation of unitary schools for the school year 1970-71. Such plan has been prepared so as to conform to the requirements of law as heretofore enunciated by the United States Court of Appeals for the Fourth Circuit.

Submission of Interim Plan by Richmond School Board

WHEREFORE, the defendants move the Court to approve the attached plan.

THE SCHOOL BOARD OF THE CITY
OF RICHMOND

* * *

PLAN FOR THE OPERATION OF UNITARY SCHOOLS FOR THE
SCHOOL YEAR 1970-71 BY THE SCHOOL BOARD OF THE
CITY OF RICHMOND

SUMMARY OF PLAN

1. All high schools are desegregated.
2. All middle schools are desegregated.
3. Wherever possible, all elementary schools are desegregated. Since black residential areas are so large that not all elementary schools can be integrated, the School Board will make available to pupils in the black schools special classes, functions and programs on an integrated basis.
4. The majority of the school careers of all students will be at integrated schools.
5. The School Board will allow majority to minority transfers and will provide free transportation by common carrier for those pupils requesting such transfers.
6. The racial ratio of the faculties in each school will be approximately the same as the ratio throughout the system. The Board will make exceptions only for specialized faculty positions.
7. Upon written request, the School Board will permit those students who will enter the twelfth grade in Sep-

Submission of Interim Plan by Richmond School Board

tember, 1970, and who reasonably expect to graduate in June, 1971, to remain in the schools which such students attended in June, 1970.

BASIC DETAILS OF PLAN

The basic organization pattern proposed by the School Board of the City of Richmond provides for the pre-annexation area of the city as follows:

Primary-elementary schools to house K through grade 5
Middle schools to house grades 6 through 8
Senior high schools to house grades 9 through 12

and in the newly annexed areas of the city

Primary-elementary schools to house grades K through 6
Middle schools to house grades 7 through 9
Senior high schools to house grades 10 through 12

The basic organization structure of the senior high schools includes grades 9 through 12. Where consideration of space necessitated, exceptions are made: namely, in the newly annexed area Huguenot High School will house grades 10 through 12 and Elkhardt and Thompson Middle Schools will house grade 9. The boundaries of the senior high schools are drawn so as to be contiguous, with one exception, this being Kennedy High School. Here satellite zones are used. Every high school building is filled to or above capacity. Portable classrooms will be used in some instances.

The senior high school plan will be implemented through the use of Virginia Transit Company regular busline transportation accompanied by a staggered opening and closing of school. On the advice of the Virginia Transit Company,

*Submission of Interim F**Plan by Richmond School Board*

the Company will be able to load but it will be necessary to accommodate the transportation schedule at approximately the same time to open schools on a staggered basis to close school at two, three, four, five, six, seven, eight, nine and ten o'clock and respective pupils involved. three and four o'clock for the

The middle school plan is primarily to accommodate students of organization is designed primarily to accommodate students in grades six, seven and eight. Exceptions to this plan were required for the middle schools in the newly annexed area due to housing restrictions and the arrangements with Chesterfield County for the exchange of students. Here the Thompson and Elkhardt Middle Schools will house grades seven, eight and nine until the School Board of the City of Richmond can assume control and responsibility for its pupils in the annexed area that must be educated by Chesterfield County in accordance with the annexation decree. The middle school attendance areas are similar to the senior high school attendance areas with varying space dictates. In the majority of instances, clusters of school buildings have been used to house the pupil population of middle school attendance areas. The middle school attendance areas were designed to be co-terminal with the senior high school attendance areas where possible so as to facilitate transportation. As with the senior high schools, regular busline Virginia Transit Company transportation will be utilized. Likewise, staggered opening and closing hours are necessitated. The Virginia Transit Company has advised the School Board that the Company can accommodate this additional volume of transportation under the conditions set forth above.

The attendance areas of transportation under the have been drawn to accomplish a maximum of desegregation through rezoning, pairing, grouping, school consolidation for primary-elementary schools

Submission of Interim Plan by Richmond School Board

and transportation, with the Virginia Transit Company maintaining its special elementary school buslines to accommodate elementary pupils who live beyond a reasonable walking distance from school. The assignment of small minority groups to certain schools is due to existing housing patterns of a limited racial mix.

Where primary-elementary or middle schools could not be integrated because of large black residential areas, the School Board is establishing social studies learning centers. These learning centers will be used to supplement such existing learning centers as the Virginia Museum of Fine Arts, the Valentine Museum, Maymont Wildlife Center, the Richmond Area Math-Science Center, Richmond Technical Center and the Richmond Trades Training Center so as to provide more desegregated learning experiences. For example, where the minority race is 10% or less in a particular school, individual classrooms of pupils in such schools will be paired with individual classrooms of pupils of the opposite race for the school year in order to provide an integrated educational experience in one of the learning centers or by inter-school visitation. The upper elementary and middle school pupils will be scheduled on at least a weekly basis and the pupils in grades K through three will be scheduled at least once every two weeks. Transportation will be provided through School Board owned equipment during the middle of the day. In addition, excursions and field trips for the same pupils will be provided.

**Excerpts from Transcript of Proceedings
of August 7, 1970**

[18] The Court: Well, the main difference is the School Board, who has known since May 27, 1968, that freedom of choice was not constitutionally viable unless it works, wait for two years to come into court. After they are brought into court they stand up and admit it did not work.

Mr. Mattox: The School Board was operating a system under the direction of this Court.

The Court: But they knew that that was no longer valid.

Mr. Mattox: But it was still operating, Your Honor, as—

The Court: You mean they were using the technical aspect; is that it?

Mr. Mattox: No, sir, they were following the directive of this Court.

The Court: In spite of the fact that they knew that that was no longer the law, Mr. Mattox, really?

Mr. Mattox: Your Honor, the law—any School Board apply this as the law under the order that was issued in this case. Whether **[19]** the law had changed or not is beside the point. It was not the law in this case at that time.

The Court: What you are saying is that this Court had better not leave any loose ends because the School Board will grab it; is that it?

Mr. Mattox: No, sir.

The Court: What are you saying?

Mr. Mattox: I am saying this School Board will follow the order of this Court to the nth degree and I am sure that it will.

Excerpts from Transcript of Proceedings of August 7, 1970

The Court: All right, sir. Thank you.

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[33] The Court: I cannot, I can tell you right now in good conscience, order the operation of a school system which the Defendants have openly—and I am not critical of it because I think you can look at the figures and see they were right—and I am going to make a finding of that in my ultimate findings. Just the figures themselves tell what the School Board did. It was a nice, honest thing to come in and say, "Let's not waste any more time on it. It simply has not worked, and let's get to it."

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[77]

Q. [Mr. Little] Coming to the basic plan, Mr. Adams, we are presenting today, what was the basic guideline, or let me go back just a moment, who prepared this plan, sir?
A. [Mr. Adams] This plan was prepared by members of my staff, under my direction.

Q. What was the basic guidelines used in preparing this plan, sir? A. We went to the statement from the Bench, that we should consider the Charlotte-Mecklenburg and the Norfolk case, and the Norfolk case, which the decision was made on **[78]** June 22nd, seemed to express the opinion that gave us more direction in terms of preparing the Plan that we have submitted, and we extracted an excerpt from that decision and we have used that, and I would like to read it, if I may, as the basis for the Plan we have submitted.

Q. What you are reading are Exhibits from the Brewer case; is that correct? A. Right.

Excerpts from Transcript of Proceedings of August 7, 1970

"The Plan should immediately desegregate all high schools. With respect to elementary and junior high schools, the Board should explore reasonable methods of desegregation, including rezoning, pairing, grouping, school consolidation and transportation. If it appears that black residential areas are so large that not all schools can be integrated, the School Board must take further steps to make sure that no pupil is excluded because of his race from a desegregated school.

"The Board should make available to pupils in the black schools special classes, functions and programs on a integrated basis and it should assign these pupils to integrated schools for a substantial portion of their school careers.

"The School Board must amend its transfer position to freely allow majority to minority transfers and provide [79] transportation by bus or common carrier so individual pupils can leave black schools. The plan must include provisions for the integration of facilities so that in each school the racial ratio shall be approximately the same as the ratio throughout the system."

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[102]

Q. [Mr. Little] All right, Mr. Adams, if you will, proceed to explain the basic plan for the elementary schools?

A. [Mr. Adams] We have taken advantage of all of the suggestions of the Court in that we have rezoned, we have paired, we have clustered, and we have consolidated and made use of available transportation to desegregate the elementary schools as far as possible.

Q. May I come back to the—excuse me.

The Court: May I just ask one question?

Mr. Little: Yes.

Excerpts from Transcript of Proceedings of August 7, 1970

The Court: You did not give any [103] consideration to additional transportation—

The Witness: Yes, sir.

The Court: —is that correct?

The Witness: No—we did.

Mr. Little: The witness said he did.

The Court: He did?

Mr. Little: Yes, sir, to the extent reasonable, I think he said.

The Witness: We considered transportation to the extent of reasonableness—

The Court: No, I mean additional from what we have already got, City Transit, school busses, and so forth?

The Witness: We went to Virginia Transit and asked them if they could provide any more transportation to move elementary children and they did not.

We did not have enough of our own transportation in order to do all of that, so that we have—

The Court: Let me interrupt something. I am not critical of it at this stage. I am trying to find out whether or not you came up with any other plan, or suggested [104] plan, contingent upon your having the transportation you wish you had perhaps?

The Witness: We certainly looked at, we certainly looked at the idea of eliminating the large number of black schools that we had in this area that are primarily here. And we felt that even if we had transportation, we had many factors that entered into the discouragement of use of transportation.

Excerpts from Transcript of Proceedings of August 7, 1970

We did look at and we did consider the pairing of the elementary schools that we left totally black with those that are almost all white.

The Court: But that would take transportation?

The Witness: That would take transportation.

The Court: Did you come to the conclusion, Mr. Adams, that the only way, whether you like it or don't like it is really immaterial at this stage, that you can really get rid of all these—now, I counted 19, roughly 19—to get rid of [105] these all-black schools would be transportation?

The Witness: That is the only way.

The Court: All right, sir, that is what I wanted to know.

The Witness: That is, we have 12 schools that are more than 90 percent black and we have 7 schools that are more than 90 percent white, and the only way that we can eliminate those schools from this situation is by transportation and cross-bussing and pairing of those schools.

* * * * *

[111] * * *

Q. [Mr. Little] All right, sir. Now, did the Fourth Circuit in what you read, did they not direct that you consider time and distance, age of children? [112] A. [Mr. Adams] That is correct.

Q. And you did that? A. We did consider that,

Q. What else did you consider? A. We, of course, have the problem of obtaining the transportation necessary to do this job. We were informed at the close—we made some investigation during the trial that indicated it would take us up to three months to get the transportation if we had the money and ordered at that time. We did not see any

Excerpts from Transcript of Proceedings of August 7, 1970

reasonable way of getting additional transportation since VTC could not furnish it.

Q. Stop right there.

You did confer and go over this with VTC to see if available public transportation was available? A. That's right.

Q. And what were you advised? A. We were advised that they could not handle it. In fact, they were handling all they could with the load that we had suggested for the secondary schools.

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[202] . . .

The Court: Excuse me. Mr. Adams, while you are on this, in consideration of pairing, was your failure to pair schools, and it is obvious if you paired certain schools you could get rid of all these 12 all-black and 7 all-white, but was your failure to do it based solely upon the transportation problem or did you or—not you—but did the Board give consideration to patron opposition of taking their children from an area such as the West End into the East End?

The Witness: We did not take the patron opposition into account. We did it on the basis of distance, the time, and the age of the children, and the fact that it looked like to us that it would be very difficult for us to do any pairing without a lot of pairing.

[294] . . .

[The Court]

First, I believe you do not have a unitary system until I study it. It may be that you have no choice. I am not saying you don't. Where you have 19

Excerpts from Transcript of Proceedings of August 7, 1970

schools that are racially identifiable, 12 right off-hand, just like that, and 7 just like that. The 7 white are even more glaring than the 12 Negro because of the racial population of the City of Richmond, 60-40. Now, that's just a—I just don't think at this stage it would be true, but I want to tell you this, Mr. Little: I am not satisfied at this stage that every reasonable effort has been made to explore, and I know that when I say this I am satisfied Dr. Little and Mr. Adams have been working day and night diligently to do the best they could, the school Board too. I know we get tired and discouraged and sometimes we think that is the end of it; and there are other things that perhaps can be done.

I have no intention—I don't think [295] that the Swann case—I think in conformance with the Swann case, I have no intention of saying that these schools are not going to open until the City of Richmond goes out and buys 200 new busses. Now then, don't be too happy. You all are waiting for a decision from the Supreme Court. All of us would like to have it. I am not sure, even when it comes that it is going to answer all the questions that the general public seems to have in their minds. It may just say no racial balance is necessary in every school. I think that's true. They may not even mention the word "bussing". But it seems to me it would be completely unreasonable to force a school system that has no transportation, and you all don't have any to any great extent, to go out and buy new busses when the United States Supreme Court may say that is wrong.

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Letter of School Board to District Court

(Filed November 16, 1970)

November 13, 1970

The Honorable Robert R. Merhige, Judge
District Court of the United States
Eastern District of Virginia
Post Office Building
Richmond, Virginia 23219

Re: Civil Action No. 3353
Report from The School Board of the
City of Richmond

Dear Judge Merhige:

Pursuant to the directive of this Court as set forth in Paragraph 5 of the Order entered in this cause on August 17, 1970, the School Board of the City of Richmond, by counsel, submits this report covering steps taken in order to create a unity system in the Richmond Public Schools.

As the record discloses, the present plan approved by this Court on an interim basis was prepared pursuant to this Court's directive that the School Board follow the specific guidelines set forth by the Court of Appeals for the Fourth Circuit in the Norfolk and Charlotte cases. This report is submitted without prejudice to the rights of the School Board to contest the validity and applicability of these specific guidelines to the Richmond case and its right to re-examine its position in the event any of the guidelines is subsequently modified or held invalid. Similarly, the School Board submits this report without prejudice to its position that this Court erred in finding that the present plan was nonunitary and that the implementation of the

Letter of School Board to District Court

plaintiffs' plan would meet the test of reasonableness as presently defined by the Fourth Circuit. The School Board further reserves the right to re-evaluate its position upon the rendition of the anticipated decisions of the United States Supreme Court in the *Swann v. Charlotte-Mecklenburg* and other cases argued on October 12-14, 1970.

In view of the present lack of preciseness and uncertainty regarding the extent of its admitted affirmative duty to disestablish its former dual system of schools, the School Board, with the view of being able to implement a new plan at the earliest practicable date, is in the process of preparing three definitive new plans for the operation of public schools within the City of Richmond. This planning is being done on the assumption that the aforementioned forthcoming decisions of the United States Supreme Court will more clearly delineate the extent and scope of the affirmative duty resting upon it. The School Board is making plans based upon the most likely alternatives and directives to be enunciated by the Supreme Court in the aforesaid cases.

The first essential step in the preparation of these plans involves the preparation of current spot maps showing the precise residence of each enrollee in the public schools of the City. It is anticipated that these spot maps for all elementary students will be completed by November 16, 1970, and for all secondary students by December 1, 1970. In a normal school year, such spot maps could have been prepared approximately 30 days earlier, but additional time is required this year because of the tremendous shifting of pupils occasioned by the implementation of the present plan and the delayed enrollment of many students this year. In addition, the spot maps would not be realistic until the completion of the efforts to locate approximately

Letter of School Board to District Court

3,500 students whose enrollment had been previously anticipated. Considerable time and effort is being spent at this time to complete this task.

It is anticipated that the three definitive plans will be completed on or before January 15, 1971.

Under the organization pattern for all three plans, the elementary level will consist of Grades K through the 5th Grade; the middle schools will consist of Grades 6 through 8; and the high schools will consist of Grades 9 through 12. The only variations from this organizational concept will be those necessitated either by the number of students involved or the availability of appropriate buildings.

One of the plans will be predicated on normal geographical zoning for all three levels within the system. The basic criteria of this plan will be proximity and accessibility of students to existing schools but with a view of integrating to the extent possible when geographic zoning alone is used as a basic criteria.

With respect to the second plan, the elementary level assignments will be based on normal geographic zoning with an effort of combining proximity and accessibility with the integration of as many schools at the elementary level as will be feasible under reasonable geographic zoning. In this second plan every middle school and high school will be integrated to a substantial degree to the extent white students are available. The plan will also embrace the concept of providing integrated learning experiences for those elementary students who under normal geographic zoning will of necessity be in predominantly white or predominantly black schools.

The third plan being prepared is designed to cover the possibility that the forthcoming decisions of the United States Supreme Court will spell out an affirmative duty on

Letter of School Board to District Court

the part of the School Board to develop a plan which will require a substantial degree of integration within every school in the system. This plan will be an alternative to that plan previously submitted to this Court by the plaintiffs. The School Board concurs in the testimony of Dr. Foster given in this case to the effect that if every school within the system must be integrated, considerable improvements both from a logistical and educational standpoint can be made in the formulation of a plan similar to the one he presented. This third plan will involve more transportation of pupils than is required under the plan approved by this Court on an interim basis. It will involve considerable additional pairing of many schools within the system requiring the transportation of approximately one-half of the students in each paired school to the other school. Subject to adjustments which will be made upon the completion of the plan, it is anticipated that this plan will require the transportation of approximately 7,500 to 8,000 additional students. This in turn would require the purchase of approximately 120 buses at an average cost of \$7,500.00 each for a total initial capital expenditure of approximately \$900,000.00. In addition, the total anticipated operating expenses for these additional 120 buses is estimated to be \$384,000.00 per school year. Under past practices of the State Board of Education, the School Board of the City of Richmond would receive reimbursements toward these operating expenses in the approximate amount of \$168,000.00, which would result in a net operating cost to the Richmond School Board of approximately \$216,000.00 per school year. Under present laws and practices, there will be no state reimbursement for any initial capital outlay or for subsequent replacement of automotive equipment.

Letter of School Board to District Court

Based on recent inquiries made of Baker Equipment Engineering Company, Smith-Moore Body Company, Inc., and Crenshaw Equipment Company, the School Board is advised that new buses can be obtained within 90 to 120 days of the date an order is placed for such equipment. This estimated delivery date would, of course, be altered in the event of any prolonged strikes or in the event that a tremendous demand is made on the suppliers as a result of desegregation decrees throughout the country.

Previous testimony in this case has established the procedures followed for the appropriation of school funds and has also established the current financial predicament of the City of Richmond.

Finally, it is the considered judgment of the school administration and the Richmond School Board that the implementation of any significant changes in the present plan during this school year would produce irreparable damage to the public school system. The system's ability to absorb as well as it has the dramatic changes occasioned by the implementation of the present plan attests to the viability of the system as a whole, but the implementation has not been made without a substantial deleterious effect on the system. The massive relocation of teachers and students has been accompanied by the as yet unexplained loss of approximately 3,500 students. Even more significantly, the tremendous logistical and administrative problems have had their predictable effect upon the normal educational program within the schools. These problems generated are being resolved as quickly as possible, but the administration has been strained to the utmost. In light of the foregoing, the School Board urgently requests this Court to weigh the easily anticipated drastic effect on the entire system if additional sweeping changes are ordered

Letter of School Board to District Court

to be implemented during this present school year. The School Board of the City of Richmond intends fully to comply with all requirements and directives of the United States Supreme Court as said requirements and directives are interpreted by this Court. It is in a posture of preparing itself to meet whatever directives may be forthcoming, but it must have reasonable time to implement any additional significant changes which might be required.

Respectfully submitted,

THE SCHOOL BOARD OF THE
CITY OF RICHMOND

By GEORGE B. LITTLE
Of Counsel

**Excerpts from Transcript of Proceedings
of November 18, 1970**

[35] * * *

The Court: While we are here, what is the status?

Mr. Little: The status is this, sir: That after conferring with counsel for the plaintiffs we have reached agreement with respect to three of the proposed schools. We are unable to agree on the balance of the schools, and I would very strenuously urge the Court to try to set a date where we can present evidence with respect to other schools, particularly two of the three elementary schools in the annexed area.

The Court: If your motion, the joinder, is successful, as I am inclined to think at this stage, it probably will be subject to what I learn from these memoranda, would this complicate that issue?

Mr. Little: No, Your Honor, because before we met with the attorneys for the plaintiffs we re-examined the proposed site locations in light of three possible alternatives.

Number one, if the Supreme Court approves the basic concept of neighborhood or normal geographic school zones, **[36]** would they be applicable there?

Number two, if the Court is restricted to decreeing the unitary plan within the confines of the City of Richmond, would it work?

But we also considered and have considered and are ready to present evidence that even if we go further in this suit and are successful in consolidating the three school districts of the three adjoining localities, that the sites involved would be appropriate for that purpose as well.

*Excerpts from Transcript of Proceedings
of November 18, 1970*

And we are most anxious to attempt to move forward to present additional evidence to this Court as to the propriety of moving ahead on these schools and as to the dire financial consequences that we are experiencing as a result of this injunction. Even above and beyond the real hardship that the people in the annexed area will have commencing in January and September, we of necessity, in view of the injunction, we will have to go to double shift operations.

So I do respectfully ask the Court, while all counsel are present in the pending suit, that we attempt to get a date for a hearing on the injunction.

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[37] . . .

[Mr. Lucas] With respect to the construction matter, I would like to advise the Court that we have had Dr. Foster, who testified in this court, come in and go with the school officials to inspect the various sites. And after counselling with Dr. Foster in terms of his experience as an administrator we did agree to the three locations indicated, and based upon the considerations Mr. Little has related, we object to all the rest. And whatever time the Court sets a hearing, we of course will be available.

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Letter of Counsel for Plaintiffs

(Dated January 6, 1971)

Mr. George B. Little
Attorney at Law
1510 Ross Building
Richmond, Virginia 23219

Re: Bradley, et al., v. School Board of
the City of Richmond, Virginia
Civil Action No. 3353

Dear Mr. Little:

I am enclosing herewith a summary recap of the fees and a separate attached sheet showing expenses to date in this matter. The first part of the fees covers the period beginning with the motion for further relief through August 11, 1970.

Two lawyers, one more than ten years experience (LRL), second lawyer four years experience, chiefly school cases, Legal Defense Fund, 32 days out of office, in and around Richmond, average 10 hours per day, at \$45.00 per hour	\$28,800.00
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Same lawyers, 5 days office work, minimum of 8 hours per day, at \$45.00 per hour	20,000.00
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Two associate lawyers with more than ten years experience, local Richmond Bar, 3 days pretrial preparation, minimum 10 hours per day, at \$45.00 per hour	2,700.00
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Two lawyers, 10 days trial, not active in participation, 8 hours per day, at \$45.00 per hour	7,200.00
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*Letter of Counsel for Plaintiffs**Additional hours subsequent to 8-11-70*

Preparation of motion for summary reversal in 4th Circuit, two lawyers (LRL and NJC) 5 hours NJC; 2 hours LRL; at \$45.00 per hour	315.00
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Opposition to stay request for both District Court and Supreme Court, including travel time—20 hours NJC; 2 hours LRL; at \$45.00 per hour	990.00
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Pretrial conference in Richmond, NJC, including travel time, 10 hours at \$45.00 per hour	450.00
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Preparation of amended complaint, including travel time; 40 hours NJC; 20 hours LRL; at \$45.00 per hour	2,700.00
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November 17, 18—hearing on motion to add parties, LRL, including travel time, 25 hours at \$45.00 per hour	1,125.00
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November 28—to Miami for depositions, including travel time, LRL, 12 hours at \$45.00 per hour	540.00
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TOTAL FEES	\$46,820.00
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TOTAL EXPENSES	13,327.56
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GRAND TOTAL FEES AND EXPENSES	\$60,147.56
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Very truly yours,

RATNER, SUGARMON & LUCAS

Louis R. Lucas

LRL:bc
enc

Submission of Desegregation Plans for 1971-72

(Filed January 15, 1971)

The Honorable Robert R. Merhige, Judge
District Court of the United States
Eastern District of Virginia
Post Office Building
Richmond, Virginia 23219

Re: Civil Action No. 3353

Dear Judge Merhige:

Pursuant to its Report of November 13, 1970, the School Board of the City of Richmond, by counsel, submits three new plans of operation for the Richmond Public Schools for the 1971-72 school year.

These plans are submitted without prejudice to the rights of the School Board to contest the validity and applicability of the specific guidelines set forth by the Court of Appeals for the Fourth Circuit in the Norfolk and Charlotte cases to the Richmond case and its right to re-examine its position in the event any of the guidelines is subsequently modified or held invalid. Neither should the submission of these plans be taken as a waiver of the position of the School Board that this Court erred in finding that the present plan was non-unitary and that the implementation of the plaintiffs' plan would meet the test of reasonableness as presently defined by the Fourth Circuit.

Furthermore, it should be pointed out that the School Board's three new plans are based upon the most likely alternatives and directives expected to be enunciated by the United States Supreme Court in its decisions in the *Swann* and other cases argued on October 12-14, 1970.

Submission of Desegregation Plans for 1971-72

Under the basic organizational pattern for all three plans, the elementary level consists of Grades K through the 5th Grade; the middle schools consist of Grades 6 through 8; and the high schools consist of Grades 9 through 12. The variations from this organizational concept are those necessitated either by the number of students involved or the availability of appropriate buildings.

Plan I is predicated on the concept of proximal geographic zoning for all three levels within the system. The basic criteria of this plan will be the proximity and accessibility of students to existing schools but with a view of integrating to the extent possible when proximal geographic zoning alone is used as a basic criteria.

In Plan II the elementary level assignments are based on proximal geographic zoning combined with pairing of contiguous school attendance areas. All middle and high schools are integrated to a substantial degree.

Plan III is submitted to cover the possibility that the United States Supreme Court will place an affirmative duty on every school board to implement a plan requiring a substantial degree of integration within every school in the system. This plan is an alternative to the plan as submitted by the plaintiffs in this case. Transportation details will be furnished to the Court no later than January 20, 1971.

If the School Board is required to implement elementary Plan III, it will recommend to the Richmond City Council the purchase of transportation equipment to enable the School Board to furnish the transportation required thereunder. The Court will recall that this record demonstrates that VTC would not be able to provide this additional transportation. Moreover, if these very young children are required to be transported, their safety and well-being could only be assured through the utilization of equipment over which the School Board has complete control.

Submission of Desegregation Plans for 1971-72

The School Board is currently in the process of completing attendance zone or line descriptions for the elementary, middle and high schools, and will submit these exhibits forthwith.

Finally, I am enclosing a copy of Mr. L. D. Adams' letter to me of January 15, 1971, in the second paragraph of which he explains how arrangements were made to handle the elementary school students returning to the Richmond School System from Chesterfield at the beginning of the 1971-72 school session. The considerable overcrowding involved in making these arrangements makes it imperative that the injunction against construction be lifted at the earliest practicable date.

Respectfully submitted,

THE SCHOOL BOARD OF THE CITY
OF RICHMOND

January 15, 1971

Mr. George Little, Attorney
1510 Ross Building
801 East Main Street
Richmond, Virginia 23219

Dear Mr. Little:

I am submitting to you today three plans of operation for the Richmond Public Schools for the 1971-72 school year, in accordance with our understanding that they might be considered in light of more definitive rulings by the Supreme Court which are expected sometime during this school year.

You will note that we have made arrangements to handle the elementary school population being returned to us from Chesterfield County at the beginning of the 1971-72 school

Submission of Desegregation Plans for 1971-72

session. We have planned to accommodate these students by removing the sixth grade from the elementary schools in the newly annexed area, by changing one additional elementary school to middle school use, by overcrowding in all middle and secondary schools, as well as going beyond the 90% capacity figure that we use in all elementary schools. The 90% capacity figure is essential because our class size is now 27, whereas our capacity figure is based on a class size of 30 pupils.

It is the intent of the School Board to request from City Council such School Board-owned transportation facilities as may be needed in addition to those provided by public carrier and as required in the implementation of an approved school desegregation plan.

Sincerely,

/s/ L. D. ADAMS
L. D. Adams
Superintendent

**Excerpts from Transcript of Proceedings
of February 16, 1971**

[17] • • •

The Court: That is one of the reasons that I have come to the conclusion that I must enter an order, preferably by April 1, and the school board just has to do the best they can. I am sorry. I don't mean to put it that way, but this matter in 1967, everybody knew what they had to do. All you had to do was read the law. Nothing was done. You can't go on and on and on.

I am hoping, of course, we will have the United States Supreme Court opinion down by then, but we might not.

The circuits are now beginning to say, and I am satisfied my circuit is going to say it, we can't wait. Just can't wait.

That may be a subtle way of suggesting to our betters in Washington that they ought to move along. I don't know.

But be that as it may I don't think it is fair to the school boards or the people to wait because we could get up into August. I cannot approve the interim plan outside a mandate from the Fourth Circuit for next year.

If there had been any other way it wouldn't have been approved this time, but we had no choice. It was either **[18]** the schools stayed closed or they operated under an illegal operation. Freedom of choice, which admittedly was not feasible, or we had to do the best we could.

So I want that entered. I want that done by April 1. I am sorry. I am sure arrangements can be made. That gives people five months. April, May, June, July, August, that's right, five months.

• • • • •

**Excerpts from Transcript of Proceedings
of March 4, 1971**

[25] . . .

By Mr. Little:

Q. Basically let's come to Plan I just for one or two questions.

For what purpose was Plan I presented to the Court?
A. [Mr. Adams] Well, the Plan I is based entirely on what we have called proximal geographic zoning which is exactly what that says. A placing of the students most conveniently to school buildings. We do that for two reasons. One is that in the event that the Supreme Court might rule that that system of zoning is acceptable then we would be on record with a plan.

Secondly, that a proximal geographic zoning does serve as the base for any other plans since you have to make your spot counts in those areas in terms of any pairing or any other type of zoning that you might use. So you would almost have to start from that position in any plan that we developed from that point.

[42] . . .

The Court: Well, you all know what the Court has said before, that it may be—well, we ought to contemplate that there may be some expression in the law which would advocate neighborhood schools for children in grades one through five within, I think, a mile and a half is a reasonable thing, but it may be something different and then everybody else gets bused, which I personally think would be the best way to accomplish what is necessary, but be that as it may we are going to have to do what the courts say.

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Letter of Counsel for the School Board

(Dated March 11, 1971)

March 11, 1971

Louis R. Lucas, Esquire
525 Commerce Title Building
Memphis, Tennessee 38103

Re: Bradley, et al., v. The School Board of the City
of Richmond

Dear Mr. Lucas:

Enclosed are revised copies of information you requested concerning fees paid and costs incurred by the School Board in the above-styled case.

The change reflected in these latest figures was necessitated by the location of two additional bills on behalf of Mr. Henry T. Wickham, Esquire, for the period December, 1962, to June 1, 1963, and the period January 1, 1964, to June 1, 1965.

The School Board was requested solely by the City Attorney's Office for the period dating from the filing of the original complaint to December, 1962, when Mr. Wickham was retained as special counsel.

It is our understanding that these enclosures are for your information only, and, accordingly, will be held in strictest confidence.

If you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

/s/ GEORGE B. LITTLE
George B. Little

Letter of Counsel for the School Board

GBL:app

Enclosures

CC: The Honorable Robert R. Merhige, Jr., Judge
 Norman J. Chachkin, Esquire

March 9, 1971

(Superseding March 2, 1971)

Bradley v. School Board, City of Richmond, Virginia

1. Records of all fees paid or due to attorneys for the School Board in the above-styled case since the date it was filed:

- (1) Tucker, Mays, Moore & Reed (firm name changed later to Mays, Valentine, Davenport & Moore)

Henry T. Wickham,
 Attorney of Record

December 1962

—June 1, 1963 \$ 2,500.00

June 1, 1963

—December 31, 1963 .. 1,980.00

January 1, 1964

—June 1, 1965 2,100.00

May 1965

—May 1966 2,190.00

May 1, 1966

—December 22, 1966 .. 90.00

March 1970

—August 1970 15,000.00

 \$23,860.00

Letter of Counsel for the School Board(2) Browder, Russell, Little
& MorrisGeorge B. Little,
Attorney of Record

July 30, 1970

—September 4, 1970 .. \$17,343.75

September 5, 1970

—December 31, 1970 .. 33,139.58

January 1, 1971

—February 26, 1971 .. 13,750.00*

\$64,233.33

*estimated

(3) Jeffreys & Lawler

J. Edward Lawler,
Attorney of Record

July 30, 1970

—September 30, 1970 \$ 7,540.00

**Excerpts from Transcript of Proceedings
of April 16, 1971**

[13] * * *

Mr. Chachkin: The only reason I bring that up, Your Honor, is that if we are forced to go to trial on schedule as to the Metropolitan aspect of the case, and the Fourth Circuit should grant a stay, we are going to be put to a very severe choice between protecting the relief that we already have by going to the Supreme Court and continuing on with further additional or new relief.

The Court: The only thing I can remind you of, Mr. Chachkin, is that you brought the suit. You brought every suit that you are involved in.

Mr. Chachkin: If the Court will recall the circumstances of the Metropolitan aspect of the case, the school board filed a motion to join and we were instructed to file an amended complaint.

The Court: I understand that, but I am talking about the original suit was filed by the plaintiffs. The **[14]** relief that was ultimately granted, recently, is a motion to stay, was relief that you all asked for. Well, not really what you asked for, but it was precipitated by your filing a suit. So I can't be sympathetic along those lines.

Of course you are not looking for sympathy.

Mr. Chachkin: I am not looking for sympathy, Your Honor. I realize how strange it is for the plaintiffs to be asking for a continuance. This is the first time we have ever asked for any delay in this case, to my knowledge.

It is unusual for plaintiffs in a school desegregation case to ask for delay.

Excerpts from Transcript of Proceedings of April 16, 1971

I don't see how this case can be tried in two weeks, adequately.

The Court: I plan to work you nights, Saturdays.

Mr. Chachkin: I was anticipating that, Your Honor. I recall the trial last year.

I am still forced to the conclusion that it will be very difficult to adequately present the issues, even on that schedule, in that period of time.

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[23] . . .

The Court: Tell me the rush in trying this case, Mr. Little. I really haven't concluded as to the motion, whether **[24]** it should be granted or not.

I don't understand the rush except all school matters ought to be handled as expeditiously as possible. I told you before, I told you when you made your motion for modification of the other order, you mentioned during the course of your argument this aspect of the case and I told you that under no circumstances was I going to be rushed into a decision on it. I was going to do it the best I could, expedite it. I try to do that in all cases. I am not going to work under deadlines with a matter of this importance. I want you to understand that.

Mr. Little: Your Honor, let's start right with that point. What is the urgency in this case?

Our basic problem is, without getting into the merits, our basic problem in this case is that the rights to equal educational opportunities and equal plaintiffs' full enjoyment of their constitutional rights to equal educational opportunities and to equal education cannot be afforded within the confines of the City of Richmond. That the full complete relief

Excerpts from Transcript of Proceedings of April 16, 1971

to which they are entitled can only be afforded through a consolidated—the implementation of a consolidated plan.

So we are talking about constitutional rights of plaintiffs. I find myself in a unique position today because I have the pleasure of repeating to this Court what this Court [25] has so often repeated to the School Board of the City of Richmond. Assuming our theory is sound, and I think we can certainly assume it for the purposes of this motion, we would not object to a delay of a week or two or something like that. But as this Court has indicated approximately 12 lawyers have cleared their dockets, the Court has cleared its docket and the earliest this case could be back in court would be in August, at the earliest. I submit that any delay like that, if we are correct that the consolidated plan is the only one that will afford complete and effective relief, realistically speaking, in all probability we are talking about an additional year's delay in the implementation of a plan.

Now, it is all well and good to speculate on stays and so forth, but this Court in the past when previous suggestions along this line have been made has answered very wisely and said, "I have no control over what other Courts do, but I recognize my duty with respect to the rights of these plaintiffs."

I don't think the possibility of a year's delay in the implementation of the relief sought can be reconciled with the very specific pronouncements of the Supreme Court which have been repeatedly and correctly reaffirmed by this Court that the time—

The Court: Say that again.

[26] Mr. Little: Sir?

Excerpts from Transcript of Proceedings of April 16, 1971

The Court: Say it again.

Mr. Little: I don't think that the probability of a year's delay in the implementation of a unitary plan, what we consider to be the full and complete relief to which the plaintiffs are entitled, can be reconciled with the very clear pronouncements of the Supreme Court which this Court has previously adhered to.

The Court: I thought you said something about and correctly.

Mr. Little: I said correctly. I was giving you credit for following the law of the land, sir. That's right.

I think the Court is inclined to do that. I don't think the possibility of this delay can be reconciled with the language in the cases with which this Court is all too familiar. This requires at once action. I think this is why there is a material question about the propriety of any continuance.

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[28] . . .

[Mr. Little] I call the Court's attention to things that it is well aware of. Number one, Mr. Chachkin and Mr. Lucas are supremely competent counsel. I don't know of any counsel more versed in cases—

The Court: Be careful now. I still have their motion for counsel fees under advisement.

[29] Mr. Little: Well, sir, this is a new motion.

The Court: All right.

Mr. Little: These gentlemen, Mr. Chachkin is employed by the Legal Defense Fund which has a battery of the most sophisticated lawyers in school desegregation cases in the country.

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**Excerpts from Transcript of Proceedings
of April 23, 1971**

[8] [The Court] In addition I would like to know, and maybe you can address yourselves to this right now and get it behind me, Mr. Little, of what is the possibilities of delay in the Richmond opening for lack of transportation facilities?

The reason I am asking it now is it so happens that I have got or received a letter today in connection with another city's transportation situation and the letter indicates that very fortunately their order was in time, but that they have been assured of delivery by midsummer. A week's delay in ordering would have meant delivery after Labor Day for that particular city and their buses. I don't recall how many they were ordering so I don't know. It may be that you all are going to be delayed anyway.

Do you know? Is your position the same now?

Mr. Little: As of yesterday, sir, the school board has ordered 56 and been promised delivery. We have requested additional appropriations from Council for additional sums so that we will have 120 buses.

Dr. Little has done a lot of prior planning, which I think puts us in a position of saying that we will have 120 buses here by September 1st.

The Court: I see.

Well, what you are saying in effect is that **[9]** transportation would not preclude you from opening on time?

Mr. Little: No, sir.

The Court: Well, that is helpful in any event to know that.

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Excerpts from Transcript of Proceedings of April 23, 1971

[36] • • •

[The Court] I don't mean to cut the plaintiffs off from their views that they may have. If you have any, gentlemen, I will be glad to hear from you.

Mr. Page, Mr. Olphin, in this connection with the matters that we are discussing today, do you have any views?

Mr. Page: Your Honor, at this time all of the indications from Mr. Chachkin are, one of the counsel for the plaintiffs, is to the effect that certainly agreements have been made with the Chesterfield and County of Henrico for discovery depositions by June of this year with the idea that the case would be tried on or after August 23, 1971. Mr. Chachkin and Mr. Lucas are now preparing for Detroit cases and I don't think they will be consummated until August of this year.

The Court: All right, sir.

Mr. Page: So therefore counsel for plaintiff here this morning could not join in concert with anything contrary to the information I am now revealing to the Court.

The Court: Well, I appreciate your views. I asked for them and I am appreciative of them.

[37] I have no reason to change it. I already found that the plaintiffs were not entitled to their continuance and I don't change that. I still feel the same way. I am sorry about their conflict, but all counsel, these gentlemen were put in a position, they were told in the beginning that you better get other help if you need it. You are going to have to try this case when the Court can try it. They all acquiesced and went along.

Excerpts from Transcript of Proceedings of April 23, 1971

Certainly Judge Roth was very cooperative out in Detroit, but that can't be helped.

I will tell you and Mr. Olphin, Mr. Page, you are the local lawyers. You are the ones to whom the Court looks. They may have to change their dates on depositions, I don't know.

**Excerpts from Transcript of Proceedings
of May 17, 1971**

[6]

[The Court] Now, gentlemen, on the trial date. First let me say this: I am not going to continue it simply because counsel says they are not ready because I don't believe counsel will ever be ready to their full satisfaction. Very few are ready for a case. But I have a motion for a continuance, the second or third one, from the plaintiffs, the Board of Supervisors of Henrico and Chesterfield, the the State Board of Education, all saying that they simply cannot do justice to the case.

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Memorandum Opinion of District Court

(Filed May 26, 1971)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

CIVIL ACTION No. 3353-R

CAROLYN BRADLEY, etc., *et al.*,

v.

THE SCHOOL BOARD OF THE
CITY OF RICHMOND, VIRGINIA, *et al.*

This class action, brought ten years ago in an effort to end racial discrimination in the operation of public schools in Richmond, Virginia, is before the Court on a motion for attorneys' fees. An appropriate ruling on the pending motion requires an abridged review of events since March of 1970.

On March 10, 1970, a motion for further relief was filed in this case, and after extensive hearings this Court ordered into effect an interim desegregation plan prepared by the School Board for the school year 1970-71, *Bradley v. School Board of City of Richmond*, 317 F. Supp. 555 (E.D. Va. 1970), and later, a plan for 1971-72, *Id.*, 325 F. Supp. 828 (E.D. Va. April 5, 1971). Appended to the motion for further relief was an application for an award of reasonable attorneys' fees, to be paid by the City School Board. In light of the defendants' conduct before and dur-

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ing litigation, and by reason of the unique character of school desegregation suits, justice requires that fees should be awarded.

This case lay dormant from 1966 until the motion of March, 1970. During that period the city schools were operated under a free choice system of pupil assignment. The plan was approved by the court of appeals, *Bradley v. School Board of City of Richmond*, 315 F.2d 310 (4th Cir. 1965), but the case was remanded for further hearings on faculty assignments by the Supreme Court, *Bradley v. School Board of the City of Richmond*, 382 U.S. 103 (1965). After some further district court proceedings the case lay idle until 1970.

When the suit was reactivated the defendants were directed, pursuant to this Court's usual practice in school desegregation cases, to state on the record whether they contended that the schools were then operating as a unitary system, and, if not, what period of time would be required to formulate a constitutional plan. In open court, albeit reluctantly, the defendants admitted that the Constitution was not being complied with;¹ they were ordered on April 1, 1970, to submit a unitary plan on or before May 11, 1970. Hearings were set for June, and the parties were admon-

¹ Of course, it scarcely excuses the School Board's continued operation under an invalid plan that they were under an outstanding court order to do so. Legal requirements change; what is consistent, moreover, with a pace of deliberate speed at one time should not be confused with the ultimate goal. The school system was in violation of outstanding authoritative decisions, *Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 138, 141 (4th Cir. 1970), rev'd. in part, 402 U.S. 1 (April 20, 1971). To await the plaintiffs' initiation of legal action may have seemed a wise strategic choice, but it cannot be equated with the fulfillment of the affirmative duty to desegregate.

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ished as to the necessity of implementing a unitary plan in the fall of 1970.

The Court will not restate its findings of fact and conclusions of law which resulted from the hearings of the summer of 1970; these are adequately covered in the reported decision. A few points relevant to the present motion should be stressed.

Although the School Board had stated, as noted, that the free choice system failed to comply with the Constitution, producing as it did segregated schools, they declined to admit during the June hearings that this segregation was attributable to the force of law (transcript, hearing of June 20, 1970, at 322). Hearings which the Court had hoped would be confined to the effectiveness of a plan of desegregation consequently were expanded; the plaintiffs were put to the time and expense of demonstrating that governmental action lay behind the segregated school attendance prevailing in Richmond. Public and private discrimination were shown to lie behind the residential segregation patterns over which the School Board proposed to draw neighborhood school zone lines. Evidence on choice of school and public housing sites, restrictive covenants in deeds, discrimination in federal mortgage insurance opportunities, housing segregation ordinances, and continued practice of private discrimination was presented, most of it without cross-examination or serious attempt at refutation. All of this proof was clearly relevant, not only under *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 431 F.2d at 141, decided just prior to the hearings, but also under *Brewer v. School Board of City of Norfolk*, 397 F.2d 37, 41 (4th Cir. 1968).

At the same hearings the School Board presented a desegregation proposal developed by a team from the Depart-

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ment of Health, Education and Welfare that was obviously unacceptable under law then current. It is hard to see how the Board could have contended otherwise, for its proposals achieved very little desegregation beyond what prevailed under the free choice system, which it had rightly declined to defend. These hearings were held more than two years after *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) was handed down. Since that time it has been clear that compliance with the Constitution is not measured by the formal racial neutrality of a pupil assignment plan but rather by its effectiveness in extinguishing the public policy of segregation. Freedom of choice had left three of seven high schools all black and one nearly all white. It left five junior high schools out of eleven all black or nearly so and two nearly all white. Of forty-four elementary schools, twenty-two were substantially all black and eight almost all white, with several others containing a significant but still grossly disproportionate Negro enrollment. The School Board's desegregation proposal—the HEW plan—would have placed small minorities of the opposite race in the three formerly black high schools and would have left the white high school unchanged. Three junior high schools would have remained as obviously black facilities and there would have been two clearly white; and five almost 100% white and fifteen nearly all black elementary schools. Many other elementary schools could not strictly have been called all black or all white, but departed substantially from the systemwide ratio and would be readily identifiable racially.²

² A full tabulation of the results projected under the HEW plan is given in *Bradley v. School Board of the City of Richmond*, *supra*, 317 F. Supp. at 564-65.

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Not only did the results of the School Board proposal condemn it, but also it failed to pass legal muster because those who prepared it were limited in their efforts further to desegregate by self-imposed restrictions on available techniques. Consideration of residential segregation in drawing zone lines was omitted, except that it was decided at a late date to pair a few schools; transportation was not seriously considered as a desegregation tool, and in general, astonishingly, race was not taken into account in the formulation of the plan. Since 1966 it has been plain that school boards in this circuit may consider race in preparing zone plans. *Wanner v. County School Board of Arlington County*, 357 F.2d 452 (4th Cir. 1966). To bar this key factor from discussion would render impossible almost the first step in the Board's task of disestablishing the dual system. For failure to address itself to the legal duty imposed upon it by *Green*, that of taking affirmative action to desegregate, the plan was manifestly invalid. Furthermore, *Swann* held that busing and satellite zoning were legitimate integration techniques. *Swann v. Charlotte-Mecklenburg Board of Education, supra*, 431 F.2d at 145-46. A plan that failed even to experiment with these legitimate tools and yet left such substantial segregation should never have been proposed to the Court.

The School Board was directed to submit a further plan within a month's time, and hearings were held on the second proposal. At the conclusion of the June proceeding the Court had specifically called the parties' attention to recent appellate rulings fixing the extent of their obligation: *Brewer v. School Board of City of Norfolk*, 434 F.2d 408 (4th Cir.) cert. denied 399 U.S. 929 (1970); *Green v. School Board of City of Roanoke*, 428 F.2d 811 (4th Cir. 1970);

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United States v. School Board of Franklin City, 428 F.2d 373 (4th Cir. 1970); *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 431 F.2d. Under these precedents the School Board's second plan also failed to establish a unitary school system. Its deficiencies are fully treated in the Court's earlier opinion;³ the most glaring inadequacy is the large proportion of elementary students placed in substantially segregated schools. The Fourth Circuit in *Swann* rejected an elementary plan which left over half the black elementary students in 86% to 100% black schools and about half the whites in 86% to 100% white schools. In the face of that ruling the School Board proposed a plan under which 8,814 of 14,943 black elementary pupils would be in twelve elementary schools over 90% black, and 4,621 of 10,296 white elementary pupils would attend seven 90% or more white schools. At the same time, although testimony in the June hearings by school administrators indicated a consensus that desegregation of such schools could not be achieved without transporting students, the School Board had in August still taken no steps to acquire the necessary equipment. Because by that time it was too late to do so by the beginning of the 1970-71 school year, the plaintiffs were forced to accept only partial relief in the form of the School Board's inadequate plan on an interim basis.

The order approving that plan included a direction to the defendants to report to the Court by mid-November the specific steps taken to create a unitary system and to advise the Court of the earliest date such a system could be put into effect.

³ *Bradley v. School Board of the City of Richmond*, *supra*, 317 F. Supp. at 572-76.

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Appeals were noted by all parties, but efforts by the City Council to secure a stay, pursued at all levels, failed. On motion of the School Board, however, briefing was postponed by the Court of Appeals pending rulings by the Supreme Court on school desegregation cases then before that court. The effect of that order was to stay all appellate proceedings.

The School Board's November report stated only that three further desegregation plans were in preparation and would be submitted on January 15, 1971. These proposals were to be based on various assumptions concerning the Supreme Court's disposition of the cases before it.

In the meantime the School Board sought relief from the Court's outstanding order enjoining planned school construction. Depositions of expert witnesses were taken and the matter was submitted on briefs. The evidence disclosed that the School Board had not seriously reviewed the site and capacity decisions which it had made, according to earlier testimony, without consideration of their impact on efforts to desegregate. Rather it was reportedly determined that the sites chosen were compatible with various conceivable measures of the affirmative duty to desegregate, none of which was consistent with current decisions. Bases for the conclusions of compatibility, moreover, were not presented. The Court declined to lift the construction injunction. *Bradley v. School Board of City of Richmond*, — F. Supp. — (E.D. Va. Jan. 29, 1971).

In December, prior to consideration of the school construction issue, the plaintiffs moved for further relief effective during the second semester of the 1970-71 school year, stating that the defendants' report indicated that they did not intend further desegregation efforts during

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the current year. The promised plans were filed in January.⁴ The only proposal which promised more than an insubstantial advance over the inadequate interim plan, the School Board's Plan 3, required the purchase of transportation facilities which the School Board still would only say it would acquire if so ordered. In its November report the Board stated firmly its opposition to any mid-year modifications of the plan.

The Court declined to order further mid-year relief, *Bradley v. School Board of City of Richmond*, — F. Supp. — (E.D. Va., Jan. 29, 1971). Because of the nearly universal silence at appellate levels, which the Court interpreted as reflecting its own hope that authoritative Supreme Court rulings concerning the desegregation of schools in major metropolitan systems might bear on the extent of the defendants' duty, the Court felt that it would not be reasonable to require further steps to desegregate during the second semester, and particularly so in view of the expense of such steps and the likelihood that they could not become effective, on account of the delay in acquiring transportation facilities, until late in that semester. The fact remains, nonetheless, that the School Board had made effective and immediate further relief nearly impossible because it had not taken the specific step of seeking to acquire buses. This policy of inaction, until faced with a court order, is especially puzzling in view of representations later made by counsel for the School Board to the effect that at least fifty-six bus units would have to be bought, in the Board's view, in order to operate under

⁴ They are described in this Court's prior opinion, *Bradley v. School Board of City of Richmond*, 325 F. Supp. 828 (E.D. Va., Apr. 5, 1971).

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nearly any possible plan during the 1971-72 school year.

Finally, the Court heard further evidence on the plan to be implemented during 1971-72.⁵ The School Board, as noted, offered three plans;⁶ one only, as stated, would work to eliminate the substantial segregation that remained in Richmond schools. Plan 1 was a strictly contiguous geographic zoning system. Plan 2, at the elementary level, suffered from the same faults which had condemned the school administration's plan in *Swann* and the interim plan in this case. Plan 3 substantially eliminated the racial identifiability of numerous elementary facilities. But, although the Board prepared that plan, they did not urge its adoption but instead endorsed plan 2 for the 1971-72 school year. At the hearings, counsel for the School Board again stated that no further transportation units would be acquired unless the Court so ordered specifically, despite that the Court had found in August of 1970 that the interim plan did not achieve a sufficient level of desegregation and could be approved as a temporary expedient only in view of the lack of equipment necessary for further desegregation. The Court directed the adoption of plan 3 for the upcoming school year.

As a very general statement of the law, it is true that American courts do not reimburse the victorious litigant for the full price of his victory, his attorney's fees and expenses. See Goodhart, *Costs*, 38 Yale L.J. 849 (1929). Like most generalizations in law, this rule is subject to

⁵ The instant motion seeks only fees and expenses for litigation to January 29, 1971, but evidence of subsequent behavior of the defendants is relevant in that it tends to show a consistent policy, pursued at all stages of the case.

⁶ Details of the proposals are given in *Bradley v. School Board of City of Richmond*, 325 F. Supp. 828 (E.D. Va., April 5, 1971).

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several exceptions. The shape of these exceptions provides an example of the tensions existent in our system between two sources of legal rules: courts and legislatures. For the cases show that courts recognize a power in themselves, necessary at times in order fully to achieve justice, to direct that a losing litigant pay his opponent's attorney's fees. This power, if it has a statutory source at all, is conferred implicitly in the grant of equitable jurisdiction. At the same time legislative directives sometimes provide that a court may or must award a winning plaintiff reasonable counsel fees. Such statutes, not infrequently, form part of a more extensive legislative scheme which creates a legal right and the appropriate remedy for its violation. It is not difficult to see how legal doubts may arise as to the court's power in a certain case to direct the payment of fees. Most federal cases involve the vindication of statutory rights. In certain cases the question arises whether Congress, in omitting from legislation any provision for the award of counsel fees, intended to impose a restriction on available relief or intended instead to permit the courts to exercise the power resting in them under existing decisions. Conversely, where a fee award is specifically authorized, the question arises whether some different factual showing from that required under general equitable principles supports an award.

The plaintiffs do not argue that explicit statutory authorization exists for an award of counsel fees. The case is brought pursuant to 42 U.S.C. § 1983 and this Court's general equitable power to enforce constitutional protections; Congress has not mandated that judgments on such cases should as a matter of ordinary course include the payment of counsel fees. *Williams v. Kimbrough*, 415 F.2d 874 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

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The case therefore presents an issue to be resolved on the basis of principles governing this Court's general equitable discretion, if discretionary power is available to the Court in matters of this nature. In seeking out whatever particular or special circumstances justify an award of attorney's fees, the Court must be mindful that this case should be compared not solely with other cases concerning school desegregation, but with all other types of litigation as well.

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), establishes that counsel fees and other litigation expenses, not taxable as costs by statute, may be awarded as part of a litigant's relief. "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts," *id.*, 164. One circumstance in which an award may be an appropriate use of the power of equity is that in which an individual litigant by his activities creates or preserves a fund in which others than he may have an interest.⁷ *Sprague* was such a case, in effect, but the Court in that decision declined to limit the equity court's power to any particular circumstances. "As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice," *Id.*, 167.

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), stresses that the principles allowing awards of counsel fees have no application in cases involv-

⁷ See, e.g., *Trustees v. Greenough*, 105 U.S. 527 (1881); *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 348 U.S. 950 (1970); *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965); *Mercantile-Commerce Bank v. Southeast Arkansas Levee District*, 106 F.2d 966 (8th Cir. 1939).

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ing "statutory causes of action for which the legislature had prescribed intricate remedies," *Id.*, 719, not intended by Congress to include the payment of counsel fees. *Fleischmann* has, however, been followed by *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). In *Newman*, an action under the 1964 Civil Rights Act, 42 U.S.C. § 2000a, et seq., an enactment which provides in terms that its remedies are exclusive, 42 U.S.C. § 2000a-6(b), the Court held that a successful plaintiff should be awarded attorney's fees in the ordinary case, under a specific provision of the act. The Court noted, however, that such a sanction could have been imposed upon a defendant who litigated in bad faith for purposes of delay, *Newman v. Piggie Park Enterprises*, *supra*, 402 n. 4, even had Congress not authorized by statute an award of counsel fees.

In *Mills* the Court directed that a corporation reimburse plaintiffs in a derivative suit for their attorney's fees, despite that the statute involved made specific provision for attorney's fees only in sections other than that on which liability was predicated in the action. Congress' failure to establish precise bounds of possible relief for violation of its prohibitions (indeed the private right of action is implied) was thought to reflect an intention not to exclude the possibility of an award of attorney's fees under conventional principles. *Mills v. Electric Auto-Lite Co.*, *supra*, 391. The Court directed an interim award on a variation of the fund theory.

Lower courts have also construed federal enactments, old and recent, not to bar an award of attorney's fees when equity would require it, in the absence of indicia of congressional purpose to render such relief unavailable. See

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Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970) (42 U.S.C. § 1982); *Kahan v. Rosentiel*, *supra*, (Securities Exchange Act § 10b, Rule 10b-5); *Local 149, International Union, Automobile, Aircraft and Agricultural Implement Manufacturers of America v. American Brake Shoe Co.*, 298 F.2d 212 (4th Cir.), *cert. denied*, 369 U.S. 873 (1962) (Labor Management Relations Act § 301).

Section 1983 and general federal equitable power to protect constitutional rights are not restricted by any congressional language indicating an intention to preclude an award of counsel fees, either by express exclusion or the creation of an intricate remedial scheme. The statute creates liability

"in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

In its reference to suits in equity the statute must be taken to authorize relief, such as an award of counsel fees, as might normally be available in such suits. Case law prior to *Fleischmann* in school desegregation cases, discussed below, recognizes the power of a federal equity court trying a desegregation suit to award counsel fees. In the light of the decisions subsequent to *Fleischmann*, such construction of § 1983 is not subject to serious question.

The issue, then, is whether this case is a proper one for a discretionary award.

Many of the cases directing or approving an award of attorney's fees turn upon the fund theory: the concept that, first, a litigant's counsel fees have been expended in such a manner as to benefit a number of other persons, not participating in the suit, and that, second, means are avail-

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able whereby such outside beneficiaries can be made to bear something like a pro rata share of expenses by taking the fee from a defendant (a fiduciary, often) who holds or controls something in which the beneficiaries have an interest. School desegregation cases, or any suits against governmental bodies, do not fit this fund model without considerable cutting and trimming. This is a class suit to be sure, with class relief, but to say that the plaintiff class will actually in effect pay their attorneys if the School Board is made to pay counsel fees entails a number of unproved assumptions about the extent to which pupils pay for their free public schooling.

Nonetheless, the fund theory does not exhaust the grounds on which an equity decree to pay counsel fees may be based. Other cases exist in which "overriding considerations indicate the need for such recovery." *Mills v. Electric Auto-Lite Co.*, *supra*, 391-92; see Note, 77 Harvard L.Rev. 1135 (1964). Such considerations in general are present when a party has used the litigation process for ends other than the legitimate resolution of actual legal disputes.

In *Guardian Trust Co. v. Kansas City Southern Railway Co.*, 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930), the Eighth Circuit reviewed exhaustively the circumstances in which an equity court might allow costs "as between solicitor and client" despite the lack of statutory authority. That court concluded that such a fee award was proper in a number of instances, including those in which a fiduciary has defended his trust, or a party has defended his title to certain property against baseless and vexatious litigation, or a defendant, charged with gross misconduct, has prevailed on the merits.

In *Rude v. Buchalter*, 286 U.S. 451 (1932), the Supreme Court held unwarranted an award of attorney's fees against

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which was required, as a bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employing of counsel to institute and carry on extensive and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situations, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. *Id.*, 481.

Although the indication that such costs are proper if "essential to the doing of justice" in a sense begs the question, the factors mentioned give some guidance. The suit obviously benefited an entire class of Negro locomotive firemen. The defendant, equipped with legislatively-conferred bargaining powers, owed them something akin to a fiduciary's concern and had violated that duty. The resources of the parties were disproportionate. The cost of litigation was disproportionate to the monetary benefit to any one plaintiff. Last, the legal issues were relatively settled before suit. Analogous factors are present in the instant litigation.

In *Taussig v. Wellington Fund, Inc.*, 187 F. Supp. 179 (D. Del. 1960) *aff'd*, 313 F.2d 472 (3d Cir. 1963), *cert. denied*, 374 U.S. 806 (1963), a stockholders derivative suit charging unfair competition, the shareholder plaintiffs were awarded attorneys' fees not out of the treasury of their corporation, which their lawsuit presumably benefited, but against those guilty of unfair practices. Such an equitable damage award, the court said, must be premised on a finding that "the wrongdoers' actions were unconscion-

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able, fraudulent, willful, in bad faith, vexatious, or exceptional," *Id.*, 187 F. Supp. at 222 (footnotes omitted).

Our own Circuit ruled that it was within the power of a court of equity to award attorneys' fees in a suit under § 301 of the Taft-Hartley Act to enforce an arbitrator's award if it were shown that the employer's refusal to comply with the award was arbitrary and unjustified. The decision was based on precedents establishing a court's equitable power and on the judicial duty to develop a body of federal law under § 301. In the particular case the litigation was justified, and a fee award improper, because questions of some legal substance remained. *Local 149, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. American Brake Shoe Co.*, *supra*.

In *Vaughan v. Atkinson*, 369 U.S. 527 (1962), attorneys' fees as an item of damages or an admiralty case were held due when the owner's conduct toward an ill seaman was consistently stubborn:

In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. *Id.*, 530-31.

A district court in another case declined to exercise its acknowledged equity power to award attorneys' fees in a suit against a labor union, finding no "fund" had been created and no compelling circumstances otherwise existed. The court commented, however, that:

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[W]ith the possible exception of civil rights litigation, see *Bell v. School Bd.*, 321 F.2d 500 (4th Cir. 1963), 77 Harv. L. Rev. 1135 (1964), no area is more susceptible to the salutary effects of the exercise of the chancellor's power to award counsel fees without the presence of a fund than litigation involving a member and his union. Primarily, this litigation seeks solely equitable relief and traditionally puts an impecunious group of members against a solvent union with little expectation of a substantial monetary award from which to pay a counsel fee, even a contingent one. This recognition has prompted several courts to allow counsel fees to successful union members who through litigation have corrected union abuse even though they have not established a fund or conferred a pecuniary benefit upon the commonwealth of the union. *Cutler v. American Federation of Musicians*, 231 F. Supp. 845 (S.D. N.Y. 1964), *aff'd*, 366 F.2d 779 (2d Cir. 1966), *cert. denied*, 386 U.S. 993 (1967).

A class suit to reapportion a local government unit, *Dyer v. Love*, 307 F. Supp. 974 (N.D. Miss. 1969), was the context for an award of counsel fees in a civil rights case. When the defendants, members of a board of supervisors, declined to reapportion their constituents, despite gross population variations between districts, and instead forced citizens to initiate "vigorously opposed" litigation, the court found this "unreasonable and obstinate" conduct to be fair basis for a fee allowance, even though there had been no Supreme Court holding during most of the suit's pendency explicitly defining the defendants' duty, *Id.*, 987. The direction of the developing law, the court said, should have

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been clear. Additionally, the court held that the absence of any fee agreement between plaintiffs and their lawyer constituted no bar to an award, because it was within the court's power to order payment to the attorneys themselves.

In another case out of the same court, an allowance of counsel fees was denied when the losing defendants, public educational administrators, were found not to have presented their defenses "in bad faith or for oppressive reasons," *Stacy v. Williams*, 50 F.R.D. 52 (N.D. Miss. 1970).

In *Lee v. Southern Home Sites Corp.*, *supra*, the Fifth Circuit authorized attorneys' fee awards in a suit under 42 U.S.C. § 1982 contesting racial discrimination in housing sales, relying on the directive in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), to fashion appropriate and effective equitable remedies for § 1982 violations. The discretionary power clearly exists, the court said, and its exercise is especially appropriate in civil rights cases, where often discrimination with wide public impact can be terminated only by private lawsuit and problems of securing legal representation have been recognized. However, because the district court's exercise of its discretion could only be reviewed on the basis of factfindings on the relevant issues, the case was remanded for further proceedings.

Numerous other cases support the power of a court of equity to allow counsel fees when a litigant's conduct has been vexatious or groundless, or he has been guilty of overreaching conduct or bad faith. See *Siegel v. William E. Bookhultz & Sons*, 419 F.2d 720 (D.C. Cir. 1969); *Smith v. Allegheny Corp.*, 394 F.2d 381 (2d Cir.) *cert. denied*, 393 U.S. 939 (1968); *McClure v. Borne Chemical Co.*, 292 F.2d 824 (3d Cir.) *cert. denied*, 368 U.S. 939 (1961); *In re Carico*, 308 F. Supp. 815 (E.D. Va. 1970); *Stevens v. Abbott, Proctor & Paine*, 288 F. Supp. 836 (E.D. Va. 1968).

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School desegregation decisions illustrate the specific application of a court's equitable discretion to allow counsel fees to plaintiffs when the evidence shows obstinate non-compliance with the law or imposition by defendants on the judicial process for purposes of harassment or delay in affording rights clearly owing. See, e.g. *Nesbit v. Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969); *Williams v. Kimbrough*, *supra*; *Cato v. Parham*, 403 F.2d 12 (8th Cir. 1968); *Rolfe v. County Board of Education of Lincoln County*, 391 F.2d 77 (6th Cir. 1968); *Hill v. Franklin County Board of Education*, 390 F.2d 583 (6th Cir. 1968); *Clark v. Board of Education of Little Rock School District*, 369 F.2d 661 (6th Cir. 1966); *Griffin v. County School Board of Prince Edward County*, 363 F.2d 206 (4th Cir. 1966); *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965); *Bradley v. School Board of City of Richmond*, *supra*, 345 F.2d; *Rogers v. Paul*, 345 F.2d 117 (8th Cir.) *rev'd on other grounds*, 382 U.S. 198 (1965); *Brown v. County School Board of Frederick County*, 327 F.2d 655 (4th Cir. 1964); *Bell v. County School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963); *Pettaway v. County School Board of Surry County*, 230 F. Supp. 480 (E.D. Va.) *rev'd on other grounds*, 339 F.2d 486 (4th Cir. 1964). See also, *Felder v. Harnett County Board of Education*, 409 F.2d 1070 (4th Cir. 1969), concerning Appellate Rule 38 and "frivolous" appeals.

A prior appellate opinion in this case states that district courts should properly exercise their power to allow counsel fees only "when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obstinate obduracy." *Bradley v. School Board of City of Richmond*, *supra*, 345

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F.2d at 321. The Court of Appeals recognized that appellate review of such orders, however, necessarily had a narrow scope and failed to disturb a nominal fee award.

In determining whether this particular lawsuit was unnecessarily precipitated by the School Board's obduracy, the Court cannot "turn the clock back," *Brown v. Board of Education of Topeka*, 347 U.S. 483, 492 (1954), to 1965. The School Board's conduct must be considered with reference to the state of the law in 1970. The Court has already reviewed the course of the litigation. It should be apparent that since 1968 at the latest the School Board was clearly in default of its constitutional duty. When haled into court, moreover, it first admitted its noncompliance, then put into contest the responsibility for persisting segregation. When liability finally was established, it submitted and insisted on litigating the merits of so-called desegregation plans which could not meet announced judicial guidelines. At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order.

Other courts have catalogued the array of tactics used by school authorities in evading their constitutional responsibilities, *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 13 (April 20, 1971) (slip opinion at 9); *Jones v. Alfred H. Mayer Co.*, *supra*, 448 n.5 (1968) (Douglas, J., concurring); *Wright v. Council of the City of Emporia*, No. 14,552, 442 F.2d 570, 593 (4th Cir. 1971) (slip opinion at 13-14) (Sobeloff, J., dissenting). The freedom of choice plan under which Richmond was operating clearly was one such. When this Court

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filed its opinion of August 17, 1970, confirming the legal invalidity of that plan, the HEW proposal, and the interim plan, it was not propounding new legal doctrine. Because the relevant legal standards were clear it is not unfair to say that the litigation was unnecessary. It achieved, however, substantial delay in the full desegregation of city schools. Courts are not meant to be the conventional means by which persons' rights are afforded. The law favors settlement and voluntary compliance with the law. When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes.

It is not argument to the contrary that political realities may compel school administrators to insist on integration by judicial decree and that this is the ordinary, usual means of achieving compliance with constitutional desegregation standards. If such considerations lead parties to mount defenses without hope of success, the judicial process is nonetheless imposed upon and the plaintiffs are callously put to unreasonable and unnecessary expense.

As long ago as 1966 a court of appeals in another circuit uttered a strong suggestion that evasion and obstruction of desegregation should be discouraged by compelling state officials to bear the cost of relief:

The Board is under an immediate and absolute constitutional duty to afford non-racially operated school programs, and it has been given judicial and executive guidelines for the performance of that duty. If well-known constitutional guarantees continue to be ignored or abridged and individual pupils are forced to resort

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to the courts for protection, the time is fast approaching when the additional sanction of substantial attorneys' fees should be seriously considered by the trial courts. Almost solely because of the obstinate, adamant, and open resistance to the law, the educational system of Little Rock has been embroiled in a decade of costly litigation, while constitutionally guaranteed and protected rights were collectively and individually violated. The time is coming to an end when recalcitrant state officials can force unwilling victims of illegal discrimination to bear the constant and crushing expense of enforcing their constitutionally accorded rights. *Clark v. Board of Education of Little Rock School District, supra*, 671.

That time has now expired. See also, *Cato v. Parham, supra*. Our Court of Appeals, too, has indicated a willingness to place litigation costs on defendants in recent cases; in *Nesbit v. Statesville City Board of Education, supra*, they took the unusual step of directing the district court to exercise its discretion in the matter in favor of the plaintiffs. This was also done six years before in *Bell v. County School Board of Powhatan County, supra*, when aggravated misconduct was shown; in *Nesbit*, by contrast, the defendants seem to have been guilty of delay alone.

Not only has the continued litigation herein been precipitated by the defendants' reluctance to accept clear legal direction, but other compelling circumstances make an equitable allowance necessary. This has been a long and complex set of hearings. Plaintiffs' counsel have demonstrated admirable expertise, discussed below, but from the beginning the resources of opposing parties have been dis-

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proportionate. Ranged against the plaintiffs have been the legal staff of the City Attorney's office and retained counsel highly experienced in trial work. Additionally the School Board possessed the assistance of its entire administrative staff for investigation and analysis of information, preparation of evidence, and expert testimony of educators. Few litigants—even the wealthiest—come into court with resources at once so formidable and so suited to the litigation task at hand. Sums paid outside counsel alone far exceed the plaintiffs' estimate of the cost of their time and effort.

Moreover, this sort of case is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class (something which must give pause to all attorneys, sensitive as is the profession to its ethical responsibilities) necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes. Coupled with the cost of proof is the likely personal and professional cost to counsel who work to vindicate minority rights in an atmosphere of resistance or outright hostility to their efforts. See *NAACP v. Button*, 371 U.S. 415, 435-36 (1963); *Sanders v. Russell*, 401 F. 2d 241 (5th Cir. 1968).

Still further, the Court must note that the defendants' delay and inaction constituted more than a cause for needless litigation. It inspired in a community conditioned to segregated schools a false hope that constitutional interpretations as enunciated by the courts pursuant to their responsibilities, as intended by the Constitution, could in

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some manner, other than as contemplated by that very document, be influenced by the sentiment of a community.

The foregoing in no manner is intended to express a lack of personal compassion for the difficult and arduous task imposed upon the members of the defendant school board. Nevertheless they, and indeed the other defendants as well, had a public trust to encourage what may well be considered one of the most precious resources of a community; an attitude of prompt adherence to the law, regardless of the manifested erroneous view that mere opposition to constitutional requirements would in some manner result in a change in those requirements.

Power over public education carries with it the duty to provide that education in a constitutional manner, a duty in which the defendants failed.

These general factors were present, although in lesser magnitude, in the *Rolax* case in 1951, in which the Fourth Circuit said that an award of counsel fees would be fully justified.

Passing the question of the appropriateness of allowing fees on the basis of traditional equitable standards, the Court is persuaded that in 1970 and 1971 the character of school desegregation litigation has become such that full and appropriate relief must include the award of expenses of litigation. This is an alternative ground for today's ruling.

The circumstances which persuaded Congress to authorize the payment of attorney's fees by statute under certain sections of the 1964 Civil Rights Act, see 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), very often are present in even greater degree in school desegregation litigation. In *Newman v.*

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Piggie Park Enterprises, Inc., *supra*, the Supreme Court elucidated the logic underlying the 1964 legislation:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. *Id.*, 401-02.

Newman was followed in *Miller v. Amusement Enterprises, Inc.*, 426 F. 2d 534 (5th Cir. 1970), in which the court recognized that in cases where the plaintiffs had undertaken no obligation to pay counsel, congressional purposes would best be served by directing payment to the lawyers.

The rationale of *Newman*, moreover, has equal force in employment discrimination cases, even where plaintiffs are only partially successful, where their lawsuit serves to bring an employer into compliance with the Act. *Lea v. Cone Mills Corp.*, No. 14,068, 438 F. 2d 80 (4th Cir. Jan. 29, 1971); *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421 (5th Cir. 1970).

School desegregation cases almost universally proceed as class actions. Use of this unconventional form of action

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converts a private lawsuit into something like an administrative hearing on compliance of a crucial public facility with legal rules defining, in part, its mission. Such result has come about as the law developed so that it protects as a matter of individual right not just admission into formerly white schools of black applicants, but attendance in a nondiscriminatory school system. *Green v. County School Board of New Kent County, supra*; *Bradley v. School Board of City of Richmond*, 317 F. 2d 429 (4th Cir. 1963).

Manifestly, too, not only are the rights of many asserted in such suits, but also it has become a matter of vital governmental policy not just that such rights be protected, but that they be immediately vindicated in fact. See 42 U.S.C. § 2000e, et seq. Partly this national goal has been pursued by administrative proceedings, but a large part of the job has fallen to the courts, and for them it has been a task of unaccustomed extent and difficulty. "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then." *Swann v. Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. 1, 13.

The private lawyer in such a case most accurately may be described as "a private attorney general." Whatever the conduct of defendants may have been, it is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy of nondiscrimination as to a large proportion of citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof. The fulfillment of constitutional guaranties, when to do so profoundly alters a key

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social institution and causes reverberations of untraceable extent throughout the community, is not a private matter. Indeed it may be argued that it is a task which might better be undertaken in some framework other than the adversary system. Courts adapt, however; but in doing so they must recognize the new legal vehicles they create and ensure that justice is accomplished fully as effectively as under the old ones. The tools are available. Under the Civil Rights Act courts are required fully to remedy an established wrong, *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 232-34 (1964), and the payment of fees and expenses in class actions like this one is a necessary ingredient of such a remedy.

This rule is consistent with the Court's power and serves an evident public policy to encourage the just and efficient disposition of cases concerning school desegregation. Cf. 42 U.S.C. § 2000c-6. It serves no person's interest to decide these cases on the basis of a haphazard presentation of evidence, hampered by inadequate manpower for research into the bases of liability and the elements of relief. Where the interests of so many are at stake, justice demands that the plaintiffs' attorneys be equipped to inform the court of the consequences of available choices; this can only be done if the availability of funds for representation is not left to chance. In this unprecedented form of public proceeding, exercise of equity power requires the Court to allow counsel's fees and expenses, in a field in which Congress has authorized broad equitable remedies "unless special circumstances would render such an award unjust," *Newman v. Piggie Park Enterprises, Inc.*, *supra*, 402. No such circumstances are present here.

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The amount of the allowance is not difficult to establish. Counsel have agreed to submit the matter of costs, fees and expenses to the Court on documentary evidence. The period of time to which this opinion relates runs from the March, 1970, motion for further relief until January 29, 1971. Findings of fact as to defendants' actions after that date have been made; these tend to establish their continuing pattern of inaction and resistance.

Trial counsel for the plaintiffs demonstrated throughout the litigation a grasp of the material facts and a command of the relevant law equaled by very few lawyers who have appeared before this Court. Needless to say their understanding of the field enabled them to be of substantial assistance to the Court, which is their duty. Local counsel did not examine witnesses, but assisted in pretrial preparation and also at hearings, as required by local rules. Some of the working hours included in counsel's estimates of time spent, moreover, include travel times. These are properly listed for two reasons. First, counsel can and do work while traveling. Second, other complex cases often require parties to enlist the aid of out-of-town counsel, for whose travel time they pay.

In conformity with practice in his home bar of Memphis, Tennessee, a lawyer for the plaintiffs secured three affidavits from disinterested brother counsel stating their estimate of the fair value of legal services rendered by plaintiffs' counsel. The affidavits state facts showing a current familiarity with prevailing fee rates and with, in two cases, the full case file. Considering the abilities of counsel, the time required, and the results achieved, these lawyers placed a value on the services very close to the estimates of the plaintiffs.

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The Virginia Supreme Court of Appeals long ago set forth the factors relevant to the value of an attorney's services:

[c]ircumstances to be considered . . . are the amount and character of the services rendered, the responsibility imposed; the labor, time and trouble involved; the character and importance of the matter in which the services are rendered; the amount of money or the value of the property to be affected; the professional skill and experience called for; the character and standing in their profession of the attorneys; and whether or not the fee is absolute or contingent . . . The result secured by the services of the attorney may likewise be considered; but merely as bearing upon the consideration of the efficiency with which they were rendered, and in that way, upon their value on a quantum meruit, not from the standpoint of their value to the client. *Campbell County v. Howard*, 133 Va. 19, 112 S.E. 2d 876, 885 (1922).

In this case the marshalling of evidence on liability and especially on remedy were complex tasks. The responsibility was probably as great as ever falls upon a private lawyer. Time spent was considerable; the Court accepts the estimates of time and expenses dated January 6, 1970, as modified in a memorandum submitted on March 15, 1970. The subject of the litigation was of the utmost importance. The Court has already referred to the lawyers' performance, which they undertook without assurance of reasonable compensation. Substantial results, too, were secured by their efforts.

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On the basis of these factors, plus the equitable considerations compelling an allowance, the Court has determined that a reasonable attorney's fee would be \$43,355.00.⁸

Expense incurred, including taxable costs, have also been estimated by the plaintiffs. As in the case of attorney's fees, these cover the period from March of 1970 through January 29, 1971, and relief is not requested with reference to matters raised by the motion for joinder of further parties filed by the School Board. Costs and expenses as to those matters are therefore not under consideration.

Because the Court has decided that plaintiffs' counsel are due an allowance of the actual expenses of the litigation, it is not necessary to determine whether certain items of expense would in the usual case be taxable as costs under 28 U.S.C. § 1920; see 6 Moore's Federal Practice ¶ 54.70, et seq. (2d ed. 1966).

Many of the expenses incurred by plaintiffs' counsel are attributable to their traveling from New York and Memphis for preparation and trial, but, as the Court already said, the complexity of cases of this sort often, as here, justifies the use of counsel from outside the local bar. The difficulty of retaining local trial counsel must be especially great in litigation over minorities' civil rights; the unpopularity of the causes and the likelihood of small reward discourage many lawyers even from mastering the field of law, much less accepting the cases. Expenses for travel, hotel accommodations and restaurant meals are fairly allowable. The Court takes notice of the fact that

⁸ The Court has reduced the requested allowance pursuant to the supplemental memorandum filed by plaintiffs under date of Mar. 15, 1971, and in addition has deducted the item of \$990 having to do with City Council's requested stay of Court's order of August 1970.

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the absence of an attorney from the area of his office usually results in financial hardship in relation to the balance of his practice, and there ought not to be superimposed thereon additional living expenses.

Fees for expert witness' testimony likewise will be allowed as an expense of suit. It is difficult to imagine a more necessary item of proof (and source of assistance to the Court) than the considered opinion of an educational expert.

Investigation assistance and office supplies likewise are obviously proper; one must contrast the rather minimal expenses of the plaintiffs under this heading with the resources used by the defendants.

Transcript costs, including those for depositions which were taken with the Court's encouragement, and miscellaneous court fees are allowable.

The Court will not assess against the School Board, however, expenses occasioned by the stay applications unsuccessfully filed by the Richmond City Council. These may be considered on a separate application.

The Court computes the total allowable expenses to be \$13,064.65. The total award, including counsel fees, comes to \$56,419.65.⁹ This is a large amount, but it falls well below the value of efforts made in defending the suit. Outside counsel for the School Board to date have submitted bills well in excess of the amounts awarded. [Portions of the submitted bills cover periods with which we are not here concerned.] In addition, as noted above, the defendants made use of the regular legal staff of the City

⁹ Expenses incurred in reference to City Council's request for stay of August 1970 order are not included herein, nor are expenses allocated to filing of amended complaint.

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Attorney and the School Board's administrative staff. For purposes of comparison, in a recent antitrust case tried by one Richmond attorney and two lawyers from outside the local bar, this Court awarded \$117,000 in counsel fees. The amount in this case is not excessive.

For the reasons stated, an order shall enter this day decreeing the payment of the sum mentioned to counsel for the plaintiffs.

ROBERT R. MERHIGE
United States District Judge

Date: May 26, 1971

Contempt Motion by Plaintiffs

(Filed July 17, 1971)

Comes now the plaintiffs through their undersigned counsel and respectfully move the Court for an order that the defendant School Board of the City of Richmond and defendants, Mrs. W. Hamilton Crockford, III, Lewis T. Booker, Mrs. William C. Calloway, Richard I. Schwarzschild, Jr., Miles J. Jones, Linwood M. Woolridge, Jr., and William O. Edwards, are in contempt of this Court's order of May 26, 1971 directing the payment forthwith of \$56,419.65 to counsel for plaintiffs.

Plaintiffs further move that until said order is obeyed, the individual defendants be imprisoned and/or fined as follows:

1. The defendant School Board a fine of \$1,000 per day.
2. The individual defendants a fine of \$500 per day to be paid from their personal assets and not from the taxes paid by plaintiffs.

Plaintiffs would respectfully suggest that if any individual defendant appears and shows to the Court that he, as an individual board member, is willing to obey the order of the Court, that he then be exempt from a finding of or penalty for contempt.

Contempt Motion by Plaintiffs

Plaintiffs will further show the Court that the defendant board has received from the defendant City Council the necessary funds to pay the award of this Court. The defendant board has willfully failed to obey the order of this Court.

/s/ JAMES R. OLPHIN
Of Counsel for Plaintiffs

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Counsel for Plaintiffs

Notice of Appeal

(Filed June 18, 1971)

Notice is hereby given that The School Board of the City of Richmond, Virginia, defendant in this action, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order entered in this action on the 26th day of May, 1971.

**THE SCHOOL BOARD OF THE CITY
OF RICHMOND, VIRGINIA**

**Excerpts from Transcript of Proceedings
of June 21, 1971**

[36] Now I must say, Mr. Little, that your suggestion that these proceedings are absurd, I think is well taken, but I don't think it is for the reason you stated. I think it is absurd that the plaintiffs still have to take this type of action.

I do not believe that the individual members of this school board, or the school board as a body, intended any disrespect to the Court or the Court's order.

If I had any doubt about that I would be dutybound to take appropriate action, but I have no doubt about that. I do not think the matter has been handled equitably or within the principles of law.

Now, these type of orders fall within that very special class that the law contemplates will happen, which determines rights that are collateral to the principal rights **[37]** that are being considered.

The law provides that, or recognizes, that they are too important to be denied review expeditiously independent of the ultimate.

So important that you can take an appeal that is not of a final ultimate judgment as you do in most cases. You can appeal this order.

It is considered important enough so that you don't have to wait until the whole cause is adjudicated.

It does disturb me at this particular time of the year, and I did encourage an appeal while we were discussing the compromise of these figures. I intimated at that time my feelings on the propriety of fees. I encouraged a compromise. You all couldn't get together, and that is all right because I take no offense at that. People have different views as to matters.

Excerpts from Transcript of Proceedings of June 21, 1971

I said at that time that I would do anything, in effect, to help with an appeal. But I said it under the theory that you could expedite it and you could have expedited it. I believe the Fourth Circuit would have taken quick action on it.

If I thought for one moment that this was a delay in doing anything, was an occasion for strategical purposes to put the plaintiffs' counsel to even a greater [38] burden than they have already been put to, I would take a different view.

I do not hold the board, or the members of the board in contempt. I do not find them to be in contempt.

I don't think equity has been done. I think they could have perfected their right of appeal and still done equity. They could have paid the money.

If successful in appeal they would have gotten it back. I have no doubt that officers of this court were good for it, would have taken it back, would have taken the burden. They didn't choose to do that, and that is all right. That is up to them.

But what has it done? It is obvious right here. We have a vote of four to three, or whatever it was. It puts people of one race voting one way and people of another voting another, the very thing that this whole litigation is about, to get rid of that. Equity was not done by the school board.

Order and Memorandum

(Filed June 22, 1971)

For the reasons stated in the memorandum of the Court this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED that:

1. The motion for a stay filed by the defendant School Board of the City of Richmond, be, and it is hereby, denied.

2. The order of this Court of May 26, 1971, remains in full force and effect, the Court having received the assurances satisfactory to it referred to in its memorandum.

3. The defendant School Board of the City of Richmond is directed to report to this Court in writing on or before 9:00 o'clock a.m., Wednesday, June 23, 1971, whether they are in compliance with the Court's order of May 26, 1971.

The United States Marshal is directed to serve, forthwith, copies of the memorandum and order on each member of the School Board of the City of Richmond, Virginia.

Let the Clerk send a copy of the memorandum and this order to all counsel of record.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

June 22, 1971.

* * *

MEMORANDUM

This matter came on to be heard on June 21, 1971, on the plaintiffs' motion that individual members of the de-

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fendant School Board be held in contempt of court for the failure of the School Board to comply with the Court's order of May 26, 1971, directing the payment of certain counsel fees. In addition to the foregoing motion there was argued before the Court the defendant School Board's motion for a stay of the Court's order of May 26, 1971, pending appeal by the defendant School Board.

For the reasons stated from the bench, the Court denied the plaintiffs' motion to hold the individual members of the School Board in contempt, and in addition the Court denied the defendants' motion for a stay. The reasons for the Court's ruling were amply enumerated in its oral rulings.

Briefly stated, the equitable considerations which prompted the Court to enter its order of May 26, 1971, requiring forthwith compliance by the said defendants of that order, likewise require, by reason of the unnecessary and unreasonable delay on the part of the defendants in filing their appeal and motion for stay, that the Court refuse said motion for a stay unless, as suggested by the defendant School Board at the bar of the Court, they are entitled to same by the posting of a supersedeas bond in an amount approved by the Court and as contemplated by Rule 62(d) of the Federal Rules of Civil Procedure.

Counsel for the defendants had requested that the Court withhold any further action until 11:00 a.m. this day, in order to supply the Court with authorities in support of their position. In the interim period, and consistent with what the Court had suggested from the bench, the defendant School Board through its counsel has now represented its willingness to forthwith pay the sums ordered by the Court on May 26, 1971, provided that the School Board is protected from any unnecessary delay in recovering such sums paid if its appeal is successful, and provided further

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that payment is without prejudice to its position on appeal.

The Court is of the opinion that equity would be served by reducing the heavy financial burden upon counsel for the plaintiffs if such payment were made in such manner as would protect the defendant School Board from any unnecessary delay in recovering said sums paid should their appeal be successful.

Accordingly, having concluded that assurances from the N.A.A.C.P. Legal Defense and Education Fund, Inc., that it would in the event of a reversal by the Court of Appeals of this Court's order of May 26, 1971, forthwith deposit with this Court for transmittal to the defendant School Board such sums as the defendant School Board now pays to counsel for the plaintiffs pursuant to the Court's order heretofore mentioned, would fully protect the said School Board in the premises, an order will be entered directing that the said defendants, if advised by this Court that appropriate assurances as heretofore mentioned have been made, report to this Court in writing by no later than 9:00 a.m., Wednesday, June 23, 1971, to the effect that they have complied with this Court's order of May 26, 1971; or, in the event no such assurances as heretofore mentioned are forthcoming, an order will be entered granting the requested stay. Equity would require, as the Court has already stated from the bench, that the defendants be reasonably indemnified in the event of a successful appeal.

An order consistent with this memorandum will be entered.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

June 22, 1971

School Board Motion to Amend Pleadings

(Filed August 26, 1971)

**SCHOOL BOARD MOTION TO AMEND PLEADINGS TO
CONFORM TO THE EVIDENCE
(AMENDED CROSS-CLAIM)**

Filed on August 26, 1971

Defendant, School Board of the City of Richmond, moves the Court for leave to amend its Answer to the Amended Complaint and Cross-Claim herein to conform to the evidence heretofore introduced at the trial of this cause over or without objection, as follows:

* * *

II. AMENDED CROSS-CLAIM

1. Defendant School Board adopts and realleges paragraph 1 of its Cross-Claim filed in this Court on January 15, 1971, as paragraph 1 of this Amended Cross-Claim, with the same force and effect as though it were set out in its entirety herein.

2. All children attending the Richmond Public Schools have a constitutional right under the Equal Protection Clause of the 14th Amendment to equality of educational

School Board Motion to Amend Pleadings

opportunity and to be free from all vestiges of the inequality inherent in a state-mandated system of dual schools.

3. The individual members of the School Board of the City of Richmond are bound by oath to support the United States Constitution which requires that they insure that all children in the Richmond public schools are afforded the equal protection of laws.

4. There is a mutuality and identity of interest between the School Board of the City of Richmond and all children attending the Richmond public schools which requires the School Board to assert claims in behalf of all such children in fulfillment of its duty to insure the protection of their constitutional rights.

5. The School Board of the City of Richmond has an affirmative duty to insure the fulfillment and protection of the constitutional rights of the pupils within its system by coming forth with a plan for the desegregation of its schools which promises realistically to afford the complete and effective relief required.

6. The current plan of desegregation for the Richmond school system, in the light of available alternatives, is constitutionally defective in that it serves merely to facilitate predictable resegregation encouraged by the maintenance of the present arrangement of school divisions and artificial boundary lines in the Richmond community which process reinforces the state-imposed dual school system in the Richmond metropolitan area and is producing a dual school system in this area and inherent inequality and lack of equal educational opportunity within the Richmond system alone.

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7. Fulfillment on the part of the Richmond School Board of its obligation to insure the protection of the constitutional rights of the children within its system has been rendered impossible owing to the maintenance of the present alignment of school divisions and the non-educationally related artificial boundaries produced thereby which encourages and facilitates resegregation within the Richmond system alone.

8. The current plan for the desegregation of the Richmond Public Schools must be assessed in terms of whether it realistically promises to afford Richmond school children their constitutional right to equal educational opportunity and quality education; such an assessment must be made in terms of the circumstances present and the options available.

9. The present alignment of school divisions in the Richmond community has been mandated and sustained by the defendant State Board of Education for many years, and was redetermined and is currently maintained by said defendant by virtue of a directive issued as recently as July 1, 1971.

10. The defendants State Board of Education and Superintendent of Public Instruction have an affirmative constitutional duty to take all steps required to effectively dismantle the state-mandated system of dual schools to the end that all children attending the Richmond public schools may enjoy their constitutional right to an equal educational opportunity.

11. Under the present alignment of school divisions in this community as mandated by the defendant State Board of Education, the school children of the City of Richmond

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are being denied their constitutional right to an equal educational opportunity owing to the maintenance by said defendant of non-educationally related artificial boundaries which facilitate resegregation within the Richmond system alone.

12. For many years the defendant state school authorities ignored and disregarded the existence of political subdivision lines in order to perpetuate a state-wide system of unconstitutionally discriminatory dual schools.

13. Under the laws enacted pursuant to the 1902 Constitution of Virginia, as amended, the defendant State Board of Education had the power to order that any single school division be comprised of multiple political subdivisions such as the City of Richmond and the Counties of Henrico and Chesterfield thus fulfilling its constitutional obligation to afford the right to an equal educational opportunity to all children attending the Richmond public schools; under the laws enacted pursuant to the 1971 revision of the Constitution of Virginia, the defendant State Board of Education, with the consent of the defendant governing bodies and school boards of the Counties of Henrico and Chesterfield and those of the City of Richmond, can order the consolidation of the three area school divisions thus fulfilling its constitutional duty in the manner set forth above; furthermore, full enjoyment of the constitutional rights of the children attending the Richmond public schools cannot be conditioned upon any provision requiring the consent of state agencies.

14. The adherence to the political subdivision boundaries of Richmond, Henrico and Chesterfield results in the denial of equal protection of the laws and the failure to af-

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ford full and complete relief to the children attending the public schools of Richmond.

15. The continued maintenance by the defendant State Board of Education of the present arrangement of school divisions in this area and the non-educationally related artificial boundaries produced thereby constitutes a direct violation of the constitutional rights of all the children in the Richmond public schools to equality of educational opportunity and to be free from all vestiges of a state enforced dual system of schools productive of inherently unequal facilities.

16. The continued maintenance by the defendant State Board of Education of the present arrangement of school divisions in this area and the non-educationally related artificial boundaries produced thereby has effectively precluded the School Board of the City of Richmond from fulfilling its affirmative duty to protect the constitutional rights of the children within its system thus necessitating this claim for relief by the Richmond School Board in behalf of its school children.

WHEREFORE, defendant School Board of the City of Richmond respectfully prays that this Court enter its Order requiring defendant State Board of Education, either pursuant to or independent of provisions of state law, to consolidate the public school systems of the City of Richmond and the Counties of Henrico and Chesterfield to form one combined school division; to bear the ultimate responsibility for the preparation of a unitary plan for the operation of all public schools within the new combined system in accordance with the specific guidelines established by this Court; to utilize its power to require the respective gov-

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ernmental subdivisions to provide adequate funds for the operation of the combined system; and to supervise pursuant to the directions of this Court all material aspects of the operation of said system.

THE SCHOOL BOARD OF THE CITY
OF RICHMOND, VIRGINIA

/s/ GEORGE B. LITTLE
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Opinion of the United States Court of Appeals
(Filed November 29, 1972)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 71-1774

CAROLYN BRADLEY, etc., et al.,

Appellees,

—versus—

THE SCHOOL BOARD OF
THE CITY OF RICHMOND, VIRGINIA, et al.,

Appellant.

Section III of the opinion, dealing with the application of Section 718 to the proceedings, heard October 2, 1972, Before HAYNSWORTH, Chief Judge, WINTER, CRAVEN, RUSSELL and FIELD, Circuit Judges (Butzner, Circuit Judge, being disqualified) sitting en banc;

Other parts of the cause heard March 7, 1972,

Before WINTER, CRAVEN and RUSSELL, Circuit Judges.

Decided November 29, 1972.

RUSSELL, Circuit Judge:

This appeal challenges an award of attorney's fees made to counsel for plaintiffs in the school desegregation suit filed against the School Board of the City of Richmond, Virginia. Though the action has been pending for a num-

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ber of years,¹ the award covers services only for a period from March, 1970, to January 29, 1971. It is predicated on two grounds: (1) that the actions taken and defenses entered by the defendant School Board during such period represented unreasonable and obdurate refusal to implement clear constitutional standards; and (2) apart from any consideration of obduracy on the part of the defendant School Board since 1970, it is appropriate in school desegregation cases, for policy reasons, to allow counsel for the private parties attorneys' fees as an item of costs. The defendant School Board contends that neither ground sustains the award. We agree.

We shall consider the two grounds separately.

I.

This Court has repeatedly declared that only in "the extraordinary case" where it has been "found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy' or persistent defiance of law", would a court, in the exercise of its equitable powers, award attorney's fees in school desegregation cases. *Brewer v. School Board of City of Norfolk, Virginia* (4th Cir. 1972), 456 F.2d 943, 949. Whether the conduct of the School Board constitutes "obdurate obstinacy" in a particular case is ordinarily committed to the discretion of the District Judge, to be disturbed only "in the face of compelling circumstances", *Bradley v. School Board of City of Richmond, Virginia* (4th Cir. 1965), 345 F.2d 310, 321. A finding of obduracy

¹ See Note 1 in majority opinion of *Bradley v. The School Board of the City of Richmond, Virginia*, decided June 5, 1972, for history of this litigation.

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by the District Court, like any other finding of fact made by it, should be reversed, however, if "the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.* (1948), 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; Wright-Miller, *Federal Practice and Procedure*, Vol. 9, p. 731 (1971). We are convinced that the finding by the District Court of "obdurate obstinacy" on the part of the defendant School Board in this case was error.

Fundamental to the District Court's finding of obduracy is its conclusion that the litigation, during the period for which an allowance was made, was unnecessary and only required because of the unreasonable refusal of the defendant School Board to accept in good faith the clear standards already established for developing a plan for a non-racial unitary school system. This follows from the pointed statements of the Court in the opinion under review that, "Because the relevant legal standards were clear it is not unfair to say that the litigation (in this period) was unnecessary", and that, "When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes."² At another point in its opinion, the Court uses similar language, declaring that "the continued litigation herein (has) been precipitated by the defendants' reluctance to accept clear legal direction, * * *."³ It would appear,

² See, 53 FRD at p. 39.

³ 53 FRD at p. 40.

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however, that these criticisms of the conduct of the Board, upon which, to such a large extent, the Court's award rests, represent exercises in hindsight rather than appraisal of the Board's action in the light of the law as it then appeared.⁴ The District Court itself recognized that, during this very period when it later found the Board to have been unreasonably dilatory, there was considerable uncertainty with reference to the Board's obligation, so much so that the Court had held in denying plaintiffs' request for mid-school year relief in the fall of 1970, that "it would not be reasonable to require further steps to desegregate * * *," giving as its reason: "Because of the nearly universal silence at appellate levels, which the Court interpreted as reflecting its own hope that authoritative Supreme Court rulings concerning the desegregation of schools in major metropolitan systems might bear on the extent of the defendants' duty."⁵ In fact, in July, 1970, the Court was writing to counsel that, "In spite of the guidelines afforded by our Circuit Court of Appeals and the United States Supreme Court, there are still many practical problems left open, as heretofore stated, including to what extent school districts and zones may or must be altered as a constitutional matter. A study of the cases shows almost limitless facets of study engaged in by the various school authorities throughout the country in attempting to achieve the necessary results."⁶ The District

⁴ See *Monroe v. Board of Com'rs. of City of Jackson, Tenn.* (6th Cir. 1972), 453 F.2d 259, 263:

"In determining whether this Board's conduct was, as found by the District Court, unduly obstinate, we must consider the state of the law as it then existed."

⁵ 53 FRD at p. 33.

⁶ See, Joint Appendix 74-75.

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Court had, also, earlier defended the School Board's request of a stay of an order entered in the proceedings on August 17, 1970, stating: "Their original (the School Board's) requests to the Fourth Circuit that the matter lie in abeyance were undoubtedly based on valid and compelling reasons, and ones which the Court has no doubt were at the time both appropriate and wise, since defendants understandably anticipated a further ruling by the United States Supreme Court in pending cases; * * *." ⁷ Earlier in 1970, too, the Court had taken note of the legal obscurity surrounding what at that time was perhaps the critical issue in the proceeding, centering on the extent of the Board's obligation to implement desegregation with transportation. Quoting from the language of Chief Justice Burger in his concurring opinion in *Norcross v. Board of Education of Memphis, Tenn. City Schools* (1970), 397 U. S. 232, 237, 90 S. Ct. 891, 25 L. Ed. 2d 426, the District Court observed that there are still practical problems to be determined, not the least of which is "to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court."⁸ In fact, the District Court had during this very period voiced its own perplexity, despairingly commenting that "no real hope for the dismantling of dual school systems (in the Richmond School system) appears to be in the offing unless and until there is a dismantling of the all Black residential areas."⁹ At this time, too, as the District Court pointed out, there was some difficulty in applying even the term

⁷ 325 F. Supp. at p. 832.

⁸ 317 F. Supp. at p. 575.

⁹ 317 F. Supp. at p. 566.

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"unitary school system".¹⁰ In summary, it was manifest in 1970, as the District Court had repeatedly stated, that, while *Brown* and other cases had made plain that segregated schools were invalid, and that it was the duty of the School Board to establish a non-racial unitary system, the practical problems involved and the precise standards for establishing such a unitary system, especially for an urbanized school system—which incidentally were the very issues involved in the 1970 proceedings—had been neither resolved nor settled during 1970; in fact, the procedures are still matters of lively controversy.¹¹ It would seem, therefore, manifest that, contrary to the premise on which the District Court proceeded in its opinion, the legal standards to be followed by the Richmond School Board in working out an acceptable plan of desegregation for its system were not clear and plain at any time in 1970 or even 1971.

It is true, as the District Court indicates, that the Supreme Court in 1968 had, in *Green v. County School Board* (1968), 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, found "freedom-of-choice" plans that were not effective unacceptable instruments of desegregation, and that the defendant Board, following that decision, had taken no affirmative steps on its own to vacate the earlier Court-approved

¹⁰ That this term "unitary" is imprecise, the District Court stated in 325 F. Supp. at p. 844:

"The law establishing what is and what is not a unitary school system lacks the precision which men like to think imbues other fields of law; perhaps much of the public reluctance to accept desegregation rulings is attributable to this indefiniteness."

¹¹ *Bradley v. The School Board of the City of Richmond, Virginia*, decided June 5, 1972, *supra*.

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"freedom-of-choice" plan for the Richmond School system, or to submit a new plan to replace it. In *Green*, the Court had held that, "if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."¹² In suggesting zoning, *Green* offered a ready and easily applied alternative to "freedom-of-choice" for a thinly populated, rural school district such as Old Kent, but other than denying generally legitimacy to freedom-of-choice plans, *Green* set forth few, if any, standards or benchmarks for fashioning a unitary system in an urbanized school district, with a majority black student constituency, such as the Richmond school system. In fact, a commentator has observed that "*Green* raises more questions than it answers."¹³ Perhaps the School Board, despite the obvious difficulties, should have acted promptly after the *Green* decision to prepare a new plan for submission to the Court. Because of the vexing uncertainties that confronted the School Board in framing a new plan of desegregation, problems which, incidentally, the District Court itself finally concluded could only be solved by the drastic and novel remedy of merging independent school districts,¹⁴ and pressed with no local complaints from plaintiffs or others, it was natural that the School Board would delay. Mere inaction under such circumstances, however, and in the face of the "practical difficulties" as reflected in the

¹² 391 U.S. at p. 441.

¹³ 82 Har. L. Rev. 116.

¹⁴ A measure found inappropriate by this Court in *Bradley v. The School Board of the City of Richmond, Virginia*, decided June 5, 1972, *supra*.

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later litigation, cannot be fairly characterized as obdurate-ness. Indeed the plaintiffs themselves were in some apparent doubt as to how they wished to proceed in the period immediately after *Green* and took no action until March, 1970. Even then they offered no real plan, contenting themselves with demanding that the School Board formulate a unitary plan, and with requesting an award of attorney's fees. It is unnecessary to pursue this matter, however, since the District Court does not seem to have based its award upon the inaction of the School Board prior to March 10, 1970, but predicated its award on the subsequent conduct of the School Board.

The proceedings, to which this award applies, began with the filing by the plaintiffs of their motion of March 10, 1970, in which they asked the District Court to "require the defendant school board forthwith to put into effect a method of assigning children to public schools and to take other appropriate steps which will promptly and realistically convert the public schools of the City of Richmond into a unitary non-racial system from which all vestiges of racial segregation will have been removed; and that the Court award a reasonable fee to their counsel to be assessed as costs." With the filing of this motion, the Court ordered the defendant School Board to "advise the Court if it is their position that the public schools of the City of Richmond, Virginia are being operated in accordance with the constitutional requirements to operate unitary schools as enunciated by the United States Supreme Court." It added that, should the defendant School Board not contend that its present operations were in compliance, it should "advise the Court the amount of time" needed "to submit a plan." Promptly, within less than a week after the Court issued

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this order, the School Board reported to the Court that (1) it had been advised that it was not operating "unitary schools in accordance with the most recent enunciations of the Supreme Court of the United States" and (2) it had requested HEW, and HEW had agreed, to make a study and recommendations that would "ensure" that the operation of the Richmond Schools was in compliance with the decisions of the Supreme Court. This HEW plan was to be made available "on or about May 1, 1970" and the Board committed itself to submit a proposed plan "not later than May 11, 1970". A few days later, the District Court held a pre-trial hearing and specifically inquired of the School Board as to the necessity for "an evidentiary hearing" on the legality of the plan under which the schools were then operating. The defendant School Board candidly advised the Court that, so far as it was concerned, no hearing was required since it "admitted that their (its) freedom-of-choice plan, although operating in accord with this Court's order of March 30, 1966, was operating in a manner contrary to constitutional requirements."¹⁵ The District Court characterizes this concession by the School Board as "reluctantly" given, and its finding of reluctance at this early stage in the proceeding is an element in the District Court's conclusion that the School Board has been obdurate. The record, however, provides no basis for this characterization of the conduct of the School Board. The School Board had manifested no reluctance to concede that its existing plan of operation did not comply with *Green*. When called on by the Court for a response to plaintiffs' motion, it had acted with becoming dispatch to enlist the assistance of that agency of Government supposed to have expertise in the

¹⁵ 338 F. Supp. 71.

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area of school desegregation and charged by law with the duty of assisting school districts with such problems. Every action of the School Board at this stage could be said to be reasonably calculated to facilitate the progress of the proceedings and to lighten the burdens of the Court. This conclusion is supported by the fact that what the Board did was apparently found acceptable and helpful by both the Court and the plaintiffs. Neither contended that the proposed time-table was dilatory or that the use of HEW was an inappropriate agency to prepare an acceptable plan. As a matter of fact, the utilization of the services of HEW under these circumstances was an approved procedure at the time, one recommended by courts repeatedly to school districts confronted with the same problem as the Richmond schools.¹⁶

On May 4, 1970, HEW submitted to the School Board its desegregation plan, prepared, to quote HEW, in response to the Board's own "expressed desire to achieve the goal of a unitary system of public schools and in accordance with our interpretation of action which will most

¹⁶ *Green v. School Board of City of Roanoke, Virginia* (4th Cir. 1970), 428 F.2d 811, 812; *Monroe v. County Bd. of Education of Madison Co., Tenn.* (6th Cir. 1971), 439 F.2d 804, 806; Note, *The Courts, HEW and Southern School Desegregation*, 77 Yale L. J. 321 (1967).

During oral argument, counsel for the plaintiffs contended that HEW had in recent months become a retarding factor in school desegregation actions, citing *Norcross v. Board of Education of Memphis*, Civ. No. 3931 (W.D. Tenn., Jan. 12, 1972), — F. Supp. —, —. Without passing on the justice of the criticism, it must be borne in mind this was not the view in 1970, as is evident in the decisions cited. This argument emphasizes again, it may be noted, the erroneous idea that the reasonableness of the Board's conduct in 1970 is to be tested, not by circumstances as they were understood then, but in the light of 1972 circumstances.

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soundly achieve this objective." In formulating its plan, HEW received no instructions from the School Board, "Except to try our best to meet the directive of the Court Order and they gave me the Court Order." There were no meetings of the School Board and HEW "until the plan had been developed in almost final form." Manifestly, the Board acted throughout the period when HEW was preparing its plan, in utmost good faith, enjoining HEW "to meet the directive" of the Court and relying on that specialized agency to prepare an acceptable plan. The Board approved, with a slight, inconsequential modification, the plan as prepared by HEW and submitted it to the Court on May 11, 1970. The District Court faults the Board for submitting this plan, declaring that the plan "failed to pass legal muster because those who prepared it were limited in their efforts further to desegregate by self-imposed restrictions on available techniques"¹⁷ and emphasizing that its unacceptability "should have been patently obvious in view of the opinion of the United States Court of Appeals for the Fourth Circuit in *Swann v. Charlotte-Mecklenburg Board of Education* 431 F.2d (138), (4th Cir. 1970), which had been rendered on May 26, 1970."¹⁸ The failure to use "available techniques" such as "busing and satellite zonings" and whatever "self-imposed limitations" may have been placed on the planners were not the fault of the School Board but of HEW, to whom the School Board, with the seeming approval of the Court and the plaintiffs, had committed without any restraining instructions the task of preparing an acceptable plan. Moreover, at the time the

¹⁷ See, 53 F.R.D. at p. 31.

¹⁸ See, 338 F. Supp. at p. 71.

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plan was submitted to the Court by the School Board, *Swann* had not been decided by this Court. And when the Court disapproved the HEW plan, the Board proceeded in good faith to prepare on its own a new plan that was intended to comply with the objectives stated by the Court.

The Court did find some fault with the Board because, "Although the School Board had stated, as noted, that the free choice system failed to comply with the Constitution, producing as it did segregated schools, they declined to admit during the June (1970) hearings that this segregation was attributable to the force of law (transcript, hearing of June 20, 1970, at 322)" and that as a result, "the plaintiffs were put to the time and expense of demonstrating that governmental action lay behind the segregated school attendance prevailing in Richmond."¹⁹ This claim of obstruction on the part of the Board is based on the latter's refusal to concede, in reply to the Court's inquiry, "that free choice did not work because it was *de facto* segregation".²⁰ It is somewhat difficult to discern the importance of determining whether the "free choice" plan represented "*de facto* segregation" or not: It was candidly conceded by the School Board that "free choice", as applied to the Richmond schools, was impermissible constitutionally, and this concession was made whether the unacceptability was due to "*de facto*" segregation or not.²¹ In a school system such as that of Richmond, where there had been formerly *de jure* segregation, *Green* imposed on the School Board the "duty to eliminate racially identifiable

¹⁹ See, 53 FRD at p. 30.

²⁰ See Joint Appendix 47, Tr. p. 322.

²¹ See 345 F.2d 322.

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schools even where their preservation results from educationally sound pupil assignment policies.”²² The School Board’s duty was to eliminate, as far as feasible, “racially identifiable schools” in its systems.²³ The real difficulty with achieving this result was that, whatever may have been the reasons for its demographic and residential patterns,²⁴

²² 82 *Har. L. Rev.* 113; cf., *Ellis v. Board of Public Instruction of Orange Co., Fla.* (5th Cir. 1970), 423 F.2d 203, 204.

²³ The very term “racially identifiable” has received no standard definition. In *Beckett v. School Board of City of Norfolk* (D.C. Va. 1969), 308 F. Supp. 1274, 1291, rev. on other grounds, 434 F.2d 408, the Court found that a school in which the representation of the minority group was 10 per cent or better was not “racially identifiable”. Dr. Pettigrew, the expert witness on whom the District Court in this proceeding relied heavily and who testified in *Beckett*, used 20 per cent in determining “racially identifiable” school population. See 308 F. Supp. 1291. The recent case of *Yarbrough v. Hulbert-West Memphis School Dist. No. 4* (8th Cir. 1972), 457 F.2d 333, 334, apparently would define as “racially identifiable” any school where the minority, whether white or black, was less than 30 per cent. The District Court in this proceeding would, in its application of the term “racially identifiable”, construe the term as embracing the idea of a “viable racial mix” in the school population, which will not lead to a desegregation of the system. 338 F. Supp. at pp. 194-5. Actually, as Dr. Pettigrew indicated, it would seem the term “racially identifiable” has no fixed definition and, its application, will vary with the circumstances of the particular situation, just as a plan of desegregation itself will vary, since, as the Court said in *Green, supra*, at p. 439, “There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case.”

²⁴ That school policy is generally a minimal factor in such situation, see 85 *Har. L. Rev.* 77. In fact, the use of zoning and restrictive covenants as instruments of segregation is far more typical of northern than southern communities. See, McCloskey, *The Modern Supreme Court* (Har., 1972), pp. 109-10:

“In fact, the maintenance of ‘black ghettos’ in the cities was north’s substitute for the segregation laws of the south • • • .”

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there was, as the Court later reluctantly recognized, no practical way to achieve a racially balanced mix, whatever plan of desegregation was adopted. With a school population approximately 65 per cent black, it was not possible to avoid having schools that would be heavily black.²⁵ The constitutional obligation thus could, in that setting, only have as its goal the one stated by the District Court, i.e., "to the extent feasible within the City of Richmond."²⁶ Indeed, it was the very intractability of the problem of achieving a "viable racial mix" that prompted the Court to suggest in July, 1970, that it might be appropriate for the defendant School Board to discuss with the school officials of the contiguous counties the feasibility of consolidation of the school districts, "all of which may tend to assist them in their obligation."²⁷

The Court's finding of obstruction particularly centers on the substitute plan which the School Board proposed on July 23, 1970, in accordance with the Court's previous directive. It found two objections to the plan. The objections are actually part of one problem, i.e., transportation. The first objection was that the plan did not require as much integration in the elementary grades as in the higher grades. Such a difference in treatment, however,

The President's Committee on Civil Rights reported in 1947 that the amount of land covered by racial restriction in Chicago was as high as 80 per cent and that, according to students of the subject, virtually all new subdivisions are blanketed by these covenants."

²⁵ Cf., *United States v. Choctaw County Board of Education*, (D.C. Ala. 1971), 339 F. Supp. 901, 903.

²⁶ See 325 F. Supp. 835.

²⁷ See Joint Appendix 74.

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the Court found had some support in both *Swann*²⁸ and *Brewer*.²⁹ An increase in the desegregation of the elementary grades, however, depended upon the purchase and use of a considerable amount of transportation equipment by the board; and this was the basis of the second criticism that "the School Board had in August (1970) still taken no steps to acquire the necessary equipment."³⁰ The Court repeated this criticism with reference to the plaintiffs' mid-term motion made in the fall of 1970 for an amendment of defendant's approved interim plan which, for implementation, "required the purchase of transportation facilities which the School Board still would only say it would acquire if so ordered."³¹ Yet at the very time when the action of the School Board in failing to buy buses was thus being found to be "unreasonably obdurate", the Court itself was declaring on August 7, 1970, that "it seems to me it would be completely unreasonable to force a school system that has no transportation, and you all don't have any to any great extent, to go out and buy new busses when the United States Supreme Court may say that is wrong."³² Again, as late as January 29, 1971, the Court, in refusing to order the immediate implementation

²⁸ 431 F.2d 138.

²⁹ In 324 F. Supp. 468, the Court said:

"Language and holdings in both *Swann* and *Brewer v. School Board of City of Norfolk*, 434 F.2d 408 (4th Cir. June 22, 1970), indicate that a school board's duty to desegregate at the secondary level is somewhat more categorical than at the elementary level."

³⁰ 53 FRD 32.

³¹ 53 FRD 32-3.

³² Joint Appendix 92-3.

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of a plan submitted by the plaintiffs, which "would require the acquisition of additional transportation facilities not then available", found that "the possibility that forthcoming rulings (by the Supreme Court)" might make such acquisition unnecessary and a needless expense induced "the Court to decide that immediate reorganization of the Richmond system would be 'unreasonable' under *Swann*." ³³ If the Court did not feel it was reasonable in January, 1971, to require the Board to purchase additional buses, it certainly cannot be said that, in the period of uncertainty in 1970, the failure of the School Board to propose such acquisition, justifies any charge of unreasonableness, much less obdurateness or action "in defiance of law" or taken in "bad faith".

The conclusion of the District Court that the Board was "unreasonably obdurate", it seems, was influenced by the feeling, repeated in a number of the Court's opinions, that "Each move (by the Board) in the agonizingly slow process of desegregation has been taken unwillingly and under coercion".³⁴ The record, as we read it, though, does not indicate that the Board was always halting, certainly not obstructive, in its efforts to discharge its legal duty to desegregate; nor does it seem that the Court itself had always so construed the action of the Board. In June, 1970, the Court remarked, that, while not satisfied "that every reasonable effort has been made to explore" all possible means of improving its plan, it was "satisfied Dr. Little and Mr. Adams (the school administrators) have been working day and night diligently to do the best they

³³ See, Joint Appendix 132, 134, 135.

³⁴ 338 F. Supp. 103; see, also, 53 FRD 39.

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could, the School Board too.”³⁵ It may be that in the early years after *Brown* the School Board was neglectful of its responsibility, but, beginning in the middle of 1965, it seems to have become more active. Moreover, the promptness and vigor with which the Board adopted and pressed the suggestion of the Court that steps be considered in connection with a possible consolidation of the Richmond schools with those of Chesterfield and Henrico Counties must cast doubt upon any finding that the Board was unwilling to explore any avenue, even one of uncharted legality, in the discharge of its obligation. The Court wrote its letter suggesting a discussion with the other counties looking to such possible consolidation on July 6, 1970. The letter was addressed to the attorneys for the plaintiffs but a copy went to counsel for the School Board. Nothing was done by counsel for the plaintiffs as a result of this letter but on July 23, 1970, the Board moved the Court for leave to make the School Boards of Chesterfield and Henrico Counties parties and to serve on them a third-party complaint wherein consolidation of their school systems with that of the Richmond systems would be required. The Board thereafter took the “laboring oar” in that proceeding. Neither it nor its counsel has been halting in pressing that action, despite substantial local disapproval.³⁶

It is clear that the Board, in attempting to develop a unitary school system for Richmond during 1970, was not operating in an area where the practical methods to be used were plainly illuminated or where prior decisions had not left a “lingering doubt” as to the proper pro-

³⁵ See, Joint Appendix 92.

³⁶ See, 338 F. Supp. 67, 100-1.

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cedure to be followed.³⁷ Even the District Court had its uncertainties. All parties were awaiting the decision of the Supreme Court in *Swann*. Before *Swann* was decided, however, the parties were engaged in an attempt to develop a novel method of desegregating the Richmond school system for which there was not at the time legal precedent. Nor can it be said that there was not some remaining confusion, at least at the District level, about the scope of *Swann* itself.³⁸ The frustrations of the District Court in its commendable attempt to arrive at a school plan that would protect the constitutional rights of the plaintiffs and others in their class, are understandable, but, to some extent, the School Board itself was also frustrated. It seems to be unfair to find under these circumstances that it was unreasonably obdurate.

II.

The District Court enunciated an alternative ground for the award it made. It concluded that school desegregation actions serve the ends of sound public policy as expressed in Congressional acts and are thus actually public

³⁷ See, *Local No. 149 I.U., U.A., A. & A.I.W. v. American Brake Shoe Co.* (4th Cir. 1962), 298 F.2d 212, 216, cert. den. 369 U.S. 873, 82 S. Ct. 1142, 8 L. Ed. 2d 276.

In *Pierson v. Ray*, 386 U.S. 547, 557 (1967), it was stated that "a police officer is not charged with predicting the future course of constitutional law." By like token, it would seem a school board should not be required, under penalty of being charged with obduracy and being saddled with onerous attorneys' fees, to anticipate or predict the future course of "constitutional law" in the murky area of school desegregation.

³⁸ See, *Winston-Salem/Forsyth County Board of Education v. Scott*, opinion of Chief Justice Burger, dated August 31, 1971, — U.S. —.

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actions, carried on by "private-attorneys general", who are entitled to be compensated as a part of the costs of the action. Specifically, it held that "exercise of equity power requires the Court to allow counsels' fees and expenses, in a field in which Congress has authorized broad equitable remedies 'unless special circumstances would render such an award unjust.'"³⁹ Apparently, though, the District Court would limit the application of this alternative ground for the award to those situations where the rights of the plaintiff were plain and the defense manifestly without merit. This conclusion follows from the fact that the Court finds this right of an award only arose in 1970 and 1971, when it might be presumed from previous expressions in the opinion, the Court concluded that all doubts about how to achieve a non-racial unitary school system had been resolved, and any failure of a school system to inaugurate such a system was obviously in bad faith and in defiance of law. That follows from this statement made by way of preface to its exposition of its alternative ground:

"Passing the question of the appropriateness of allowing fees on the basis of traditional equitable standards, the Court is persuaded that in 1970 and 1971 the character of school desegregation litigation has become such that full and appropriate relief must include the award of expenses of litigation. This is an alternative ground for today's ruling."⁴⁰

If this is the basis for the Court's alternative ground, it really does not differ from the rule that has heretofore

³⁹ See 53 FRD at p. 42.

⁴⁰ See, 53 FRD at p. 41.

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been followed consistently by this Court that, where a defendant defends in bad faith or in defiance of law, equity will award attorney's fees. The difficulty with the application of the Court's alternative ground for an award on this basis, though, is its assumption that by 1970 the law on the standards to be applied in achieving a unitary school system had been clearly and finally determined. As we have seen, there was no such certainty in 1970; indeed it would not appear that such certainty exists today. And it is this very uncertainty that is the rationale of the decision in *Kelly v. Guinn* (9th Cir. 1972), 456 F.2d 100, 111, where the Court, citing both the District Court's opinion involved in this appeal (53 FRD 28), and *Lee v. Southern Home Sites Corp.* (5th Cir. 1970), 429 F.2d 290, 295-296,⁴¹ sustained a denial of attorney's fees in a school integration case, because:

"First, there was substantial doubt as to the school district's legal obligation in the circumstances of this case; the district's resistance to plaintiffs' demands rested upon that doubt, and not upon an obdurate refusal to implement clear constitutional rights. Second, throughout the proceedings the school district has evinced a willingness to discharge its responsibilities under the law when those duties were made clear."

If, however, an award of attorney's fees is to be made as a means of implementing public policy, as the District Court indicates in its exposition of its alternative ground of award, it must normally find its warrant for such action

⁴¹ See, also, *Lee v. Southern Home Sites Corp.* (5th Cir. 1971), 444 F.2d 143.

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in statutory authority.⁴² Congress, however, has made no provision for such award in school desegregation cases. Legislation to such effect, included in a bill to assist in the integration of educational institutions, was introduced in 1971 in Congress but it was not favorably considered. Moreover, in the Civil Rights Act of 1964, it expressly provided for such award in both the equal employment opportunity⁴³ and the public accommodations sections⁴⁴ but pointedly omitted to include such a provision in the public education section.⁴⁵ In giving effect to this contrast in the several titles of the Civil Rights Act of 1964, and in affirming that any award of attorney's fees in a school desegregation case must be predicated on traditional equitable standards, the Court in *Kemp v. Beasley* (8th Cir. 1965), 352 F.2d 14, 23, said:

"Congress by specifically authorizing attorney's fees in Public Accommodation cases and not making allowance in school segregation cases clearly indicated that insofar as the Civil Rights Act is concerned, it does not authorize the sanction of legal fees in this type of action. The doctrine of *Expressio unium est exclusio alterius* applies here and is dispositive of this contention."

⁴² See *Fleischmann v. Maier Brewing Co.* (1967), 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475; see, also, *Brewer v. School Board of City of Norfolk, Virginia*, *supra*, note 22, at p. 950.

⁴³ See, Section 2000 e-5(k), 42 U.S.C.

⁴⁴ See, Section 2000 a-3(b), 42 U.S.C.

⁴⁵ Section 2000 e-7, 42 U.S.C.; and see, *United States v. Gray* (D.C. R.I. 1970), 319 F. Supp. 871, 872-3. See, however, Note 57, *post*.

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The same conclusion was reached in *Monroe v. Board of Com'rs. of City of Jackson, Tenn.* (6th Cir. 1972), 453 F.2d 259, 262-3, note 1, where an award though sustained, was sustained on the ground of "unreasonable, obdurate obstinacy" as enunciated in *Bradley v. School Board of Richmond, Virginia* (4th Cir. 1965), 345 F.2d 310, 321, and not as a vehicle for the enforcement of public policy. To the same effect is *United States v. Gray, supra*.

It is suggested that *Mills v. Electric Auto-Lite* (1970), 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593, and *Lee v. Southern Home Sites Corp.* (5th Cir. 1971), 444 F.2d 143, sustain this alternative award as in the nature of a sanction designed to further public policy. Any reliance on *Mills* is "misplaced, however, because conferral of benefits, not policy enforcement, was the *Mills* Court's stated justification for its holding." 50 *Tex. L. Rev.* 207 (1971).⁴⁶ In fact, the award in *Mills* was based on the same concept of benefit as was used to support the award in *Trustees v. Greenough* (1881), 105 U.S. 527. 36 *Mo. L. Rev.* 137 (1971). Equally inapposite is *Lee*. Though filed under Section 1982, it was like unto, and, so far as relief was concerned, should be treated similarly as an action under Section 3612(c), 42 U.S.C., in which attorney's fees are allowable.⁴⁷ By this

⁴⁶ See, also, *Kahan v. Rosenstiel* (3d Cir. 1970), 424 F.2d 161, 166:

"In the *Mills* opinion, Justice Harlan noted that the plaintiffs' suit conferred a benefit on all the shareholders * * *." (Italics added.)

⁴⁷ See, particularly note 2, p. 147, 444 F.2d.

This case has been criticized in 50 *Tex. L. Rev.* 207. Thus, it finds untenable its attempt to identify its award with the statutory authorization provided in Section 3612(c), because, "Under the latter statute (section 3612) the court may not award attorney's fees to a plaintiff financially able to pay his own fees." (Page 208).

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reasoning, the Court sought to bring the award within the umbrella of a parallel specific statutory authorization.⁴⁸ There is no basis for such a rationale here.

If, however, the rationale of *Mills* is to be stretched so as to provide a vehicle for establishing judicial power justifying the employment of award of attorney's fees to promote and encourage private litigation in support of public policy as expressed by Congress or embodied in the Constitution, it will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination, and, even more difficult, which public policy warrants the encouragement of award of fees to attorneys for private litigants who voluntarily take upon themselves the character of private attorneys-general.⁴⁹ Counsel in environmental cases would claim such a role for their services.⁵⁰ The protection of historical houses and monuments against the encroachment of highways has been cloaked within the mantle of public interest and it would be argued should receive the encouragement of an award.⁵¹ Consumers' suits are

⁴⁸ *Knight v. Auciello* (1st Cir. 1972), 453 F.2d 852, is a similar case, involving discrimination proscribed by Section 1982, 42 U.S.C.

⁴⁹ See, Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 *University of Chicago L. Rev.* 316, at pp. 329-30 (1971).

⁵⁰ See, Section 4332(2), et seq., 42 U.S.C.; *Environmental Defense Fund v. Corps of Eng. of U. S. Army* (D.C. Ark. 1971), 325 F. Supp. 749; *Environmental Defense Fund, Inc. v. Corps of Engineers* (D.C. D.C. 1971), 324 F. Supp. 878; *Businessmen Affected Severely, etc. v. D.C. City Council* (D.C. D.C. 1972), 339 F. Supp. 793.

⁵¹ See, Section 461, 16 U.S.C., and Section 4331(b)(4), 42 U.S.C.; *West Virginia Highlands Conserv. v. Island Creek Coal Co.* (4th Cir. 1971), 441 F.2d 232; Cf., *Ely v. Velde* (D.C. Va. 1971), 321 F. Supp. 1088.

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clearly to be considered.⁵² Apportionment suits justify awards under this theory.⁵³ First Amendment rights are often spoken of as preferred constitutional rights. Attacks upon statutes infringing free speech would, under this theory, command an allowance. But it must be emphasized that whether the enforcement of Congressional purpose in all these cases commands an award of attorney's fees is a matter for legislative determination. And Congress has not been reticent in expressing such purpose in those cases where it conceives that such special award is appropriate. In many instances, where Congress has enacted statutes designed to further public purpose, it has bulwarked their enforcement with provisions for the allowance of counsel fees to attorneys for private parties invoking such statutes; in other cases it has denied such awards.⁵⁴ In some of the statutes authorizing such allowances, the award is, as in the statute involved in *Newman v. Piggie Park Enterprises* (1968), 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263, either mandatory or practically so; in others it is discretionary⁵⁵ and the granting of awards is generally made through the use of the same guidelines as motivate courts in making awards under the traditional equity rule. Should the courts, in those in-

⁵² See, 38 *University of Chicago L. Rev.* 316.

⁵³ Actually, an alternative award has been made in such a case. *Sims v. Amos* (3-judge ct. Ala. 1972), — F. Supp. — (filed March 17, 1972).

⁵⁴ See Annotation, 8 L. Ed. 2d 894, at pp. 922-32, for a listing of statutes authorizing an award of attorney's fees. To this list should be added Section 1640, 15 U.S.C. (Truth-in-Lending Act).

⁵⁵ See, for instance, Section 153, 43 U.S.C.; *United Transportation Union v. Soo Line RR Co.* (7th Cir. 1972), 457 F.2d 285.

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stances where Congress has failed to grant the right, review the legislative omission and sustain or correct the omission as the court's judgment on public policy suggests? This, it seems to us, would be an unwarranted exercise of judicial power. After all, Courts should not assume that Congress legislates in ignorance of existing law, whether statutory or precedential. Accordingly, when Congress omits to provide specially for the allowance of attorney's fees in a statutory scheme designed to further a public purpose, it may be fairly accepted that it did so purposefully, intending that the allowance of attorney's fees in cases brought to enforce the rights there created or recognized should be allowed only as they may be authorized under the traditional and long-established principles as stated in *Sprague v. Ticonic Bank* (1939), 307 U.S. 161, 166, 59 S. Ct. 777, 83 L. Ed. 1184. Such consideration, it would seem, was the compelling reason that prompted one commentator to offer the apt *caveat* that the determination of public policy as a predicate for such awards should be more safely left with Congress and not undertaken by the Courts. Thus, in 50 *Tex. L. Rev.* 209 (1971), it is stated:

"The decision, (referring to *Lee*) however, sanctions excessive judicial discretion that may emasculate the general rule against fee awards and inject more unpredictability into the judicial process. The legislature should formulate a rule that would promote predictability and utilize the power inherent in fee allocation to pursue the goals it desires to achieve, one of which would be equal access to the courts."

Even the author of the Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 *University*

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of *Chicago L. Rev.*, 316, though sympathetic to the extension of *Mills* to cover awards of attorney's fees in support of public policy, recognizes that a general policy, applicable to all cases, on the award of attorney's fees should be adopted, concluding its review of the subject with this comment:

"Logically, one of two things must happen: either judicial discretion to grant fees on policy grounds will result in universal fee shifting from the successful party, or the courts will withdraw to the traditional position, denying any fee transfer without specific statutory authorization. *Mills* represents an uneasy half-way house between these two extremes." (Page 336)

We find ourselves in agreement with the conclusion that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts.⁵⁶ This is especially true in school cases, where the guidelines are murky and where harried, normally uncompensated School Boards must tread warily their way through largely uncharted and shadowy legal forests in their search for an acceptable plan providing what the courts will hopefully decide is a unitary school system.

⁵⁶ It is interesting that in all the cases where the right to make an award for policy reasons has been stated, it has been stated simply as an alternative ground to a finding of unreasonable obduracy. See, 53 FRD at pp. 39-42, and *Lee, supra*, at p. 144. In *Sims, supra*, at p. —, the Court found that, "The history of the present litigation is replete with instances of the Legislature's neglect of, and even total disregard for, its constitutional obligation to reapportion." In short, no court has yet predicated an award exclusively upon the promotion of public policy.

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Accordingly, until Congress authorizes otherwise awards of attorney's fees in school desegregation cases must rest upon the traditional equitable standards as stated in *Bradley v. Richmond School Board* (4th Cir. 1965), 345 F.2d 310, which provide ample scope for the award in appropriate cases.

III.

After the above opinion had been prepared but not issued, the Congress enacted Section 718 of the Emergency School Aid Act. The appellees promptly called to the Court's attention this Section, suggesting that it provided an alternative basis for the award made. They construed the reference in the Section to "final order" to embrace any appealable order dealing with any issue raised in a school desegregation case. Any order which had been appealed and was pending on appeal, unresolved, on the effective date of the Section (i.e., July 1, 1972), they argued, could provide a proper vehicle for an award under the Section.^{56a}

Since this issue of the application of Section 718 was raised simultaneously in a number of other pending appeals, it was determined to withhold the above opinion for the time being, and to consider *en banc* the reach of

^{56a} During the course of the oral argument counsel for the appellees was asked to define the term "final order" as used in Section 718. His reply was,

" * * * there is mention of final order in the legislative material—they use that term rather than a final judgment because in recognition of the peculiar nature of school cases,—that is you may have a wave of litigation that would end up in a final decision by this court or the Supreme Court and then the case would again be relitigated later—that order which is appealable is a final order."

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Section 718, as applied both to this case and to the other related appeals. Such *en banc* hearing has been had and the Court has concluded that Section 718 does not reach services rendered prior to June 30, 1972.⁵⁷

Were it to be construed as extending to any "final order", entered as "necessary to secure compliance", and pending unresolved on the effective date of the Act (which is the plaintiffs' construction of the sweep of the Section), such Section could not be used as a vehicle to validate this award. This is so because there was no "final order" pending unresolved on appeal on June 30, 1972, to which this award could attach. The only proceeding pending unresolved in this case on May 26, 1971, when the District Court issued its order allowing attorney's fees, was the action begun on motion of the School Board itself to require the merger of the Richmond schools with those of the contiguous counties of Chesterfield and Henrico. All orders issued prior to that date in this desegregation action had long since become final and were not pending on appeal either on May 26 or on the date Section 718 became effective. Thus, on August 17, 1970, the District Court had approved the School Board's interim plan for the school year 1970-1. There was no appeal perfected from that order. The plaintiffs had moved on December 9, 1970 for additional relief but that motion had been denied by an order dated January 29, 1970, which, incidentally, was the same date used by the District Court for the cut-off of its allowance of attorney's fees. Again, there was no

⁵⁷ *James v. The Beaufort County Board of Education* (72-1065); *Copland, et al. v. School Board of the City of Portsmouth, Virginia, et al.* (Nos. 71-1993 and 71-1994); *Thompson v. The School Board of the City of Newport News, Virginia, et al.* (Nos. 71-2032 and 71-2033), filed October —, 1972.

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appeal from that order dismissing plaintiffs' application for relief, and, even if it be assumed that plaintiffs' attorneys are to be granted attorneys' fees when they do not prevail (an assumption clearly not permitted under the language of Section 718), the proceeding under which that order was entered was not pending when Section 718 became effective.⁵⁸ To restate: The only proceedings pending undetermined by an order that had not become final on the date Section 718 became effective was the action begun by the School Board and resulting in the order of the District Court dated January 10, 1972.⁵⁹ That order, which, it may be assumed, is still pending since the School Board is presently seeking certiorari, was reversed by this Court⁶⁰ and, unless the decision of this Court is in turn reversed, it will not support any allowance of attorneys' fees, since Section 718 authorizes allowance only when plaintiffs have prevailed.

REVERSED.

⁵⁸ It is true that on January 29, 1971, the School Board submitted to the District Court its proposed plan for the operation of the Richmond schools for the school year 1971-2. There seems to have been either no dispute over this plan or the proposal was swallowed up in the more expansive merger action.

⁵⁹ 338 F. Supp. 67.

⁶⁰ 462 F.2d 1058.

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WINTER, *Circuit Judge*, dissenting:

The in banc court holds that this case is not governed by § 718 of Title VII, "Emergency School Aid Act," of the Education Amendments of 1972. P.L. 92-318; 86 Stat. 235; 1972 U.S. Code and Admin. News 1908, 2051. The panel concludes both that the Richmond School Board was not guilty of "unreasonable, obdurate obstinacy" and that plaintiffs were not entitled to recover counsel fees under the private attorney general concept. On all issues, I would conclude otherwise and I therefore respectfully dissent.

I.

Because I conclude not only that § 718 is applicable to this litigation, but also that, as a matter of statutory construction, its terms are met, I place my dissent from the panel's decision primarily on that ground. If, however, § 718 is treated as inapplicable to this case, I would affirm the district court, preferably on my concurring views in *Brewer v. School Board of City of Norfolk, Virginia*, 456 F.2d 943, 952-54 (4 Cir. 1972) cert. den. — U.S. — (1972). Even if the obdurate obstinacy test controls, I would still affirm. As I read the record, I can only conclude that for the period for which an allowance of fees was made, the Richmond School Board was obdurately obstinate. Commendably, it seized the initiative in vindicating plaintiffs' rights by seeking to sustain a consolidation of school districts; but this was a latter-day conversion that occurred after the district court suggested that consolidation be explored. Until that time the record reflects the Board's stubborn reluctance to implement *Brown I* (*Brown v. Board of Education*, 347 U.S. 483 (1954)) in the light of *Green v. County School Board of New Kent*

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County, Va., 391 U.S. 430 (1968); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter v. West Feliciana Parish School Board*, 396 U.S. 226 (1969); and, while the litigation was progressing, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The history of the litigation, as set forth in the opinion of the district court, is sufficient to prove the point. *Bradley v. School Board of City of Richmond, Virginia*, 53 F.R.D. 28, 29-33 (E.D. Va. 1971).

II.

I turn to the more important questions of the scope and application of § 718. Neither in the instant case, nor in *James v. The Beaufort County Board of Education*, — F.2d — (4 Cir. decided simultaneously herewith), does the majority articulate in other than summary form why § 718 should not apply to cases pending on its effective date (July 1, 1972). I conclude that it does apply, and in the face of the majority's silence, I must discuss the pertinent authorities at some length.

The text of § 178 is set forth in the margin.¹ Its enactment presents no question of retroactive application to this

Attorney Fees

¹ Sec. 718. Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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litigation. As I shall show, the issue of the allowance of counsel fees has been an issue throughout every stage of the proceedings; and the proceedings were not terminated when § 718 became effective on July 1, 1972, because this appeal was pending before us. This is not a case where a subsequent statute is sought to be applied to events long past and to issues long finally decided. Rather, it is a case which presents the concurrent application of a statute to an issue still in the process of litigation at the time of its enactment. *United States v. Schooner Peggy*, 1 Cranch 103 (1801), and *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), are the significant controlling authorities.

In *Peggy*, while an appeal was pending from a decision of the lower court in a prize case, the United States entered into a treaty with France, which if applicable would have required reversal. The treaty explicitly contemplated that it would be applicable to seizures that had taken place prior to the treaty's ratification where litigation had not been terminated prior to ratification. On the basis of the new treaty, the Supreme Court reversed the decision of the lower court. In the opinion of Mr. Justice Marshall, it was said:

It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction

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which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction confirming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

United States v. Schooner *Peggy*, *supra*, 1 Cranch at 109.

Peggy may be interpreted in two ways: Under a narrow interpretation the Court held only that, where the law changes between the decision of the lower court and an appeal, the appellate court must apply the new law if, by its terms, it purports to be applicable to pending cases. The decisional process, under this interpretation, requires the appellate court to examine the intervening law and to determine whether it was intended to apply to factual situations which transpired prior to the law's enactment. Since the treaty in *Peggy* explicitly applied to situations where the controversy was still pending, it followed that the statute should be applied in deciding the case. Certainly the facts of *Peggy* and much of the language of the opinion of Mr. Justice Marshall support this interpretation.

By a broader interpretation, *Peggy* may be considered to hold that where the law has changed between the occurrence of the facts in issue and the decision of the appel-

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late court and where the controversy is still pending, the appellate court must apply the new law, unless there is a positive expression that the new law is not to apply to pending cases. This is the interpretation of *Peggy* which found its final expression in *Thorpe*. But before turning to *Thorpe* it is well to consider intervening decisions.

In *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941), the Court held that a federal appellate court in exercising diversity jurisdiction must follow a state court decision which was subsequent to and contradicted the district court decision. In *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23 (1940), the Court held that the appellate court must apply an intervening federal statute where the case is pending on appeal. However, in *Carpenter*, the statute explicitly indicated that it was to apply to pending cases. In *United States v. Chambers*, 291 U.S. 217 (1934), the Court held that indictments returned pursuant to the eighteenth amendment, and before the adoption of the twenty-first amendment, must be dismissed after passage of the twenty first amendment even though the acts when committed were crimes. See also *Ziffrin v. United States*, 318 U.S. 73 (1943). Then, in *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court drew a firm distinction between those cases where an appeal is still pending and those that are final ("where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . .," 381 U.S. at 622, n. 5). The Court held that *Mapp v. Ohio*, 367 U.S. 643 (1961), applied to pending cases but not to final cases. It discussed the previous decisions to which reference has been made and concluded that "[u]nder our cases . . . a change in law will be given effect while a case is on direct review.

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...” 381 U.S. at 627. It should be noted, however, that the Court was by no means consistent in applying this rule after *Linkletter*. See *Desist v. United States*, 394 U.S. 244, 256-60 (1969) (Harlan, J., dissenting).

In *Thorpe*, the Housing Authority gave the tenant notice to vacate in August, 1965, but refused to give its reasons for the notice. When the tenant refused to vacate, the Authority brought an action for summary eviction in September, 1965, and prevailed. Actual eviction, however, was stayed during the pendency of the litigation. In 1967, before the Supreme Court decided the case, the Department of Housing and Urban Development issued a circular directing that tenants must be given reasons for their eviction. The Supreme Court held that housing authorities must apply the HUD circular “before evicting any tenant still residing in such projects on the date of this decision.” 393 U.S. at 274. Relying on *Peggy*, it explained that “[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision,” although it recognized that “[e]xceptions have been made to prevent manifest injustice. . . .” 393 U.S. at 281-82.

The difference between *Thorpe* and *Peggy* is that the HUD circular did not indicate that it was to be applied to pending cases or to facts which had transpired prior to its issuance. Indeed, the circular stated that it was to apply “from this date” (the date of issuance). 393 U.S. at 272, n. 8. Thus, *Thorpe* held that even where the intervening law does not explicitly or implicitly contemplate that it would be applied to pending cases, it, nevertheless, must be applied at the appellate level to decide the case. The line of cases from *Peggy* to *Thorpe* dictates the application of § 718 in the instant case, irrespective of legis-

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lative intent. Simply stated, since the law changed while the case (the lawyers' fees issue) was still pending before us, the new law applies.

The School Board contends that *Thorpe* does not erase the long-standing rule of construction favoring prospective application. It argues that *Thorpe* did not present a retroactivity question since the tenant had not yet been evicted. It places great reliance on the "tenant still residing" language in the opinion. The School Board concludes that since the tenant had not yet been evicted, the HUD circular was not retroactively applied but was currently applied to a still pending eviction. With respect to the legal services in issue in the instant case, the Board argues that the *Thorpe* rule does not apply since the performance of legal services was a completed act prior to the effective date of § 718.

While the Board's premise regarding the interpretation of *Thorpe* may not be faulted, its analogy is inapt and its conclusion incorrect. True, the rendition of legal services in the instant case had been completed (except for legal services on appeal), but the dispute over who was liable for payment was very much alive, as alive as the dispute over eviction in *Thorpe*. The proper analogy is not between rendition of legal services and the eviction litigation, but between rendition of legal services and the Housing Authority's termination of the lease and notice to vacate. These are the completed acts. What lingers is the dispute over who is right, and it lingers in both cases. Therefore, as in *Thorpe*, here there is no retroactivity issue. *Thorpe* governs and § 718 applies unless it is rendered inapplicable because one or more of its provisions has not been

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met. See *Bassett v. Atlanta Independent School Dist. No. 1550* (E.D. Tex. August 28, 1972).¹

III.

Since *Thorpe* governs, legislative history is not relevant, unless it unequivocally shows an intention on the part of Congress that the statute not apply to live issues in currently pending cases. The legislative history of § 718 provides no such expression of intent. To the extent that it proves anything, it supports the conclusion that § 718 should apply to live issues in currently pending cases.

¹ It must be recognized that there are some discordant notes in the case law: In *Soria v. Oxnard School Dist. Board*, — F.2d — (9 Cir. August 21, 1972), it was held, in a per curiam opinion, that § 803 of the Education Amendments of 1972, which postponed the effectiveness of busing orders for the purpose of achieving racial balance until all appeals have been exhausted, had no application to a case pending at the time of its effective date in which busing, pursuant to an integration plan, is already in operation. There is no mention, however, of *Thorpe*.

In *Greene v. United States*, 376 U.S. 149 (1964), the Court refused to apply an intervening Department of Defense regulation to a pending case, reasoning in retroactivity language. But this case was obviously one where "retroactivity" would work "manifest injustice." See *Thorpe*, *supra* at 282 n. 43. Cases construing the Criminal Justice Act, 18 U.S.C.A. § 3006A (1970), which provides court-appointed attorneys with fees from federal funds have held that it applies only where counsel was appointed after the Act, or at least, only where counsel's assistance was rendered after the Act. Compare *United States v. Pope*, 251 F.S. 331 (D. Neb. 1966) with *United States v. Dutsch*, 357 F.2d 331 (4 Cir. 1966); *United States v. Thompson*, 356 F.2d 216 (2 Cir. 1965) cert. den. 384 U.S. 964 (1966); *Dolan v. United States*, 351 F.2d 671 (5 Cir. 1965) (per curiam). But that Act involved expenditures of federal appropriations which, by the terms of the Act, would not become effective until a year after enactment, so that it may be fairly said that there was a clear legislative intention not to make the terms of the Act applicable to pending cases.

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Two clauses of § 718 bear on the issue. As originally proposed and reported, § 718 provided for a federal fund of \$15 million from which counsel would be paid "for services rendered, and the costs incurred, after the date of enactment . . ." S. 683, § 11 (Quality Integrated Education Act). The Senate Committee on Labor and Public Welfare reported the bill, with this clause intact, as § 1557. Sen. Rep. No. 92-61. 92nd Cong. 1st Sess. pp. 55-56.

The School Board places great stress on this language as indicating a strictly prospective legislative intent. It fails to point out, however, that the federal funding, as well as the "after the date" clause, were deleted by floor amendment prior to the passage of the Act. This floor amendment can be construed to indicate that Congress' ultimate intent was indeed the opposite of that urged by the Board. The "after the date" clause and federal funding seem to have gone in tandem. Given the nature of federal appropriation, prospective application would be a sensible requirement. Compare Criminal Justice Act, 18 U.S.C.A. § 3006A (1970). By the deletion of federal funding, the reason for restricting payment of attorneys' fees for services performed after the date of enactment disappeared.

Secondly, the School Board points to the language in the committee report which refers to "additional efforts," but the sentence is phrased in the conjunctive. It reads: "\$15 million is set aside *for additional efforts* under this bill and under Title I of the Elementary and Secondary Education Act of 1965 * * * *and for vigorous nation-wide enforcement of constitutional and statutory protection against all forms of discrimination*" (emphasis added). Whether "additonal efforts" modifies everything that follows, or

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just what precedes the conjunction "and", is debatable and a rather unenlightening inquiry.

Thus, nothing on the face of § 718, or in its legislative history, conclusively manifests a congressional desire that the *Thorpe* rule applying new legislation to live issues in pending litigation should not prevail. I turn to the question of its precise application.

IV.

Section 718 empowers the court to award counsel fees "in its discretion, upon a finding that the proceedings were necessary to bring about compliance. . . ." The private attorney general rule of *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), governs the court's discretion. Under the *Piggie Park* standard, the court should award counsel fees "unless special circumstances would render such an award unjust." 390 U.S. at 402. See *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4 Cir. 1971). The language of § 718 is substantially similar to the counsel fee provisions in § 204(b) of Title II and § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a-3(b), 2000e-5(k), and § 812(c) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. § 3612(c), all of which are governed by *Piggie Park*. Moreover, the legislative history of § 718 reveals that its purpose is the same as the counsel fee provisions in Titles II, VII, and VIII. 117 Cong. Rec. S. 5484, 5490 (Daily Ed. April 22, 1921); *id.* S. 5537 (Daily Ed. April 23, 1971). The additional standard in § 718 requiring the court to find that the suit was necessary to bring about compliance does not modify the *Piggie Park* standard, because its purpose, as revealed by the legislative history, is to deter champertous

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claims and the unnecessary protraction of litigation. 117 Cong. Rec. S. 5485, 5490-91 (Daily Ed. April 22, 1971). In the instant case, the district court found that suit was necessary to bring about compliance and it also found, at least implicitly, that there were no exceptional circumstances which would render an award of counsel fees against the School Board unjust. These findings are not clearly erroneous and hence counsel are entitled to some allowance of fees under § 718 as construed by *Piggie Park*.

V.

Although § 718 should be applied to legal services, whenever rendered, in connection with school litigation culminating in an order entered after its effective date (July 1, 1972), § 718 will not support affirmance of the precise award made by the district court in this case. It would, however, support a larger award to compensate for legal services rendered over a longer period.

The district court's award was for legal services rendered from March 10, 1970, the date when plaintiff filed a motion for further relief because of the decisions in *New Kent County*, supra, *Alexander*, supra, and *Carter*, supra, to January 29, 1971, the date on which the district court declined to implement plaintiff's plan. Manifestly, the entry of that order cannot support an award of counsel fees for services to the date of its entry because the order did not grant relief to the parties seeking to recover fees—a condition precedent to the award of fees as set forth in § 718. But, a recitation of the history of the litigation shows that counsel fees should be awarded for all legal services rendered from March 10, 1970 to April 5, 1971, the date on which the district court entered an order

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approving the plan under which the Richmond schools are presently being operated, and thereafter for legal services rendered in this appeal.

The essential dates in the history of the litigation follow: The motion for further relief was filed March 10, 1970. Appended thereto was an application for an award of reasonable attorneys' fees. After admitting that its schools were not then being constitutionally operated, the Board filed a plan (Plan 1) to bring the operation of the schools into compliance with the Constitution. After hearings, the district court disapproved Plan 1 (June 26, 1970) and directed the preparation and filing of a new plan. Plan 2 was filed July 23, 1970, and hearings were held on it. It, too, was disapproved as an inadequate long-range solution. But, because there was insufficient time to prepare, file and consider another plan before the beginning of the next school term, Plan 2 was ordered into effect on August 17, 1970, for the term commencing August 30, 1970, and the Board was also ordered to make a new submission. The Board appealed from the order implementing Plan 2 and obtained a delay in briefing from this court. The appeal was never heard, because, having been effectively stayed, it was rendered moot by later orders. Before Plan 3 was filed, plaintiffs sought further relief for the second semester of the 1970-71 school year, but Plan 3 was filed (January 15, 1971) before they could be heard and their motion was denied on January 29, 1971, the terminal date for the allowance of compensation in the order appealed from. Plan 3 contained three parts—it was a restatement of Plans 1 and 2, and it contained a new third proposal. The Board urged the adoption of the Plan 2 aspect of Plan 3; but, on April 5, 1971, the district court ordered

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into effect for the 1971-72 school year the new third proposal. This is the plan under which the Richmond schools are presently operating.³

To this summary there need only be added that on August 17, 1970, the district court ordered the parties to confer on the subject of counsel fees. Plaintiffs filed on March 5, 1971, a memorandum in support of their request for an allowance; the court, on March 10, 1971, ordered that further memoranda and evidentiary materials with regard to the motion for counsel fees be filed; and these were filed on March 15, 1971. The order directing the payment of counsel fees was entered May 26, 1971, after the entry of the order approving and implementing Plan 3.

The majority concludes that § 718 was rendered inapplicable because the order appealed from was entered May 26, 1971, a date on which there was no "final order" entered as "necessary to secure compliance." This conclusion seems to me to be overly technical and not in accord with the facts.

The request for counsel fees was made when the motion for additional relief was filed on March 10, 1970. While very much alive throughout the proceedings, properly, the motion was not considered until the district court could approve a plan for a unitary system of schools for Richmond which was other than an interim plan. That approval was forthcoming on April 5, 1971, and promptly thereafter the district court addressed itself to the question of

³ Of course, there were even still further proceedings culminating in an order to consolidate the Richmond, Henrico County and Chesterfield School Districts, but this court set that order aside in *Bradley v. The School Board of the City of Richmond, Virginia*, — F.2d — (4 Cir. June 5, 1972), application for cert. filed October —, 1972.

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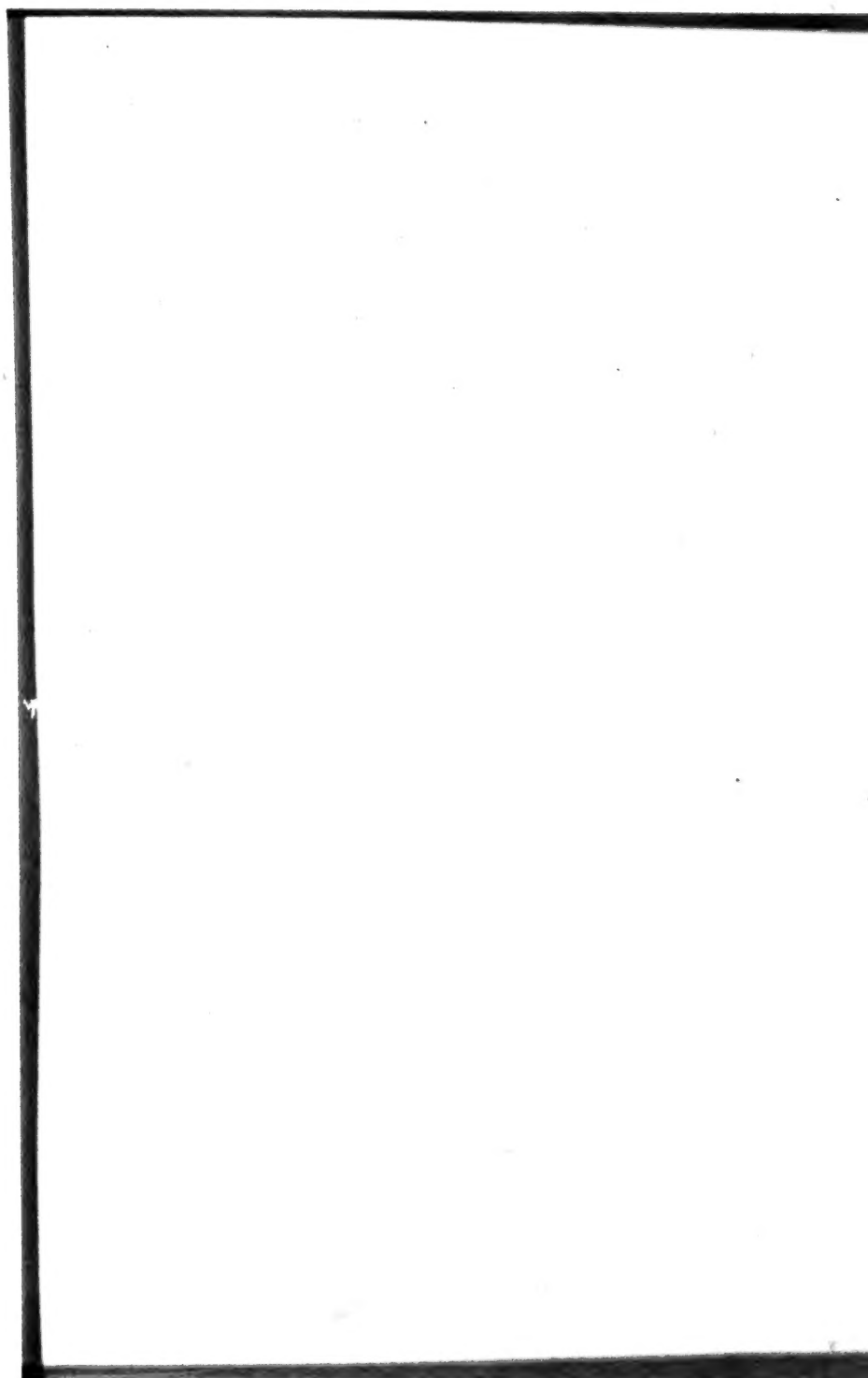
allowance of counsel fees. The approval of a permanent plan was not easily arrived at. Because the proposals of the Richmond School Board were constitutionally unacceptable, except on an interim basis, this approval was arrived at in several steps: (a) disapproval of Plan 1, (b) interim approval of Plan 2, (c) disapproval of additional interim relief, and (d) approval of Plan 3.

Certainly, § 718 is not to be so strictly construed that any counsel fees allowable thereunder must be allowed the very instant that an order granting interim or permanent relief is entered. A request for fees may present difficult questions of fact and require the taking of evidence. The burden of deciding these questions should not be added to the simultaneous burden of deciding the often very complex question of what is a constitutionally acceptable desegregation plan; rather, the issues should be severed and the question of counsel fees decided later so long as the issue of counsel fees had been present throughout the litigation and has not been raised as an afterthought after the school desegregation plan has become final. These practical considerations, plus the fact that every stage in the proceedings has been a part of an overall transition from unconstitutionally operated schools in Richmond to constitutionally operated schools, lead me to the conclusion that the exact terms and conditions of § 718 have in the main been met.

While I therefore conclude that there was a sufficient nexus between the request for counsel fees and the entry of a final order necessary to obtain compliance with the Constitution so as to warrant invoking § 718, I think that § 718 requires that the district court redetermine the allowance. As previously stated, the district court made an

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allowance for services to the date that plaintiffs' request for additional interim relief was denied. If the various steps for arriving at an overall desegregation plan for Richmond are severed, § 718 would not permit an allowance for services leading to the order of January 29, 1971, since on that date plaintiffs were denied the additional interim relief they prayed and § 718 permits an allowance only to the prevailing party. However, plaintiffs would be entitled to an allowance for services beyond January 29, 1971, up to April 5, 1971, the date of approval of Plan 3, because on that date they became the prevailing party and they obtained an order, still in effect, which required the schools of Richmond to be operated agreeably to the Constitution. I would therefore vacate the judgment and remand the case for a redetermination of the amount of the allowance—in short, I would require that counsel be compensated for their services to and including April 5, 1971 and also their services on appeal in this case.



SUPREME COURT, U. S.

FILED

MAR 29 1972

IN THE

Supreme Court of the United States

October Term, 1972

No. **72-1322**

CAROLYN BRADLEY, et al.,

Petitioners,

vs.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, et al.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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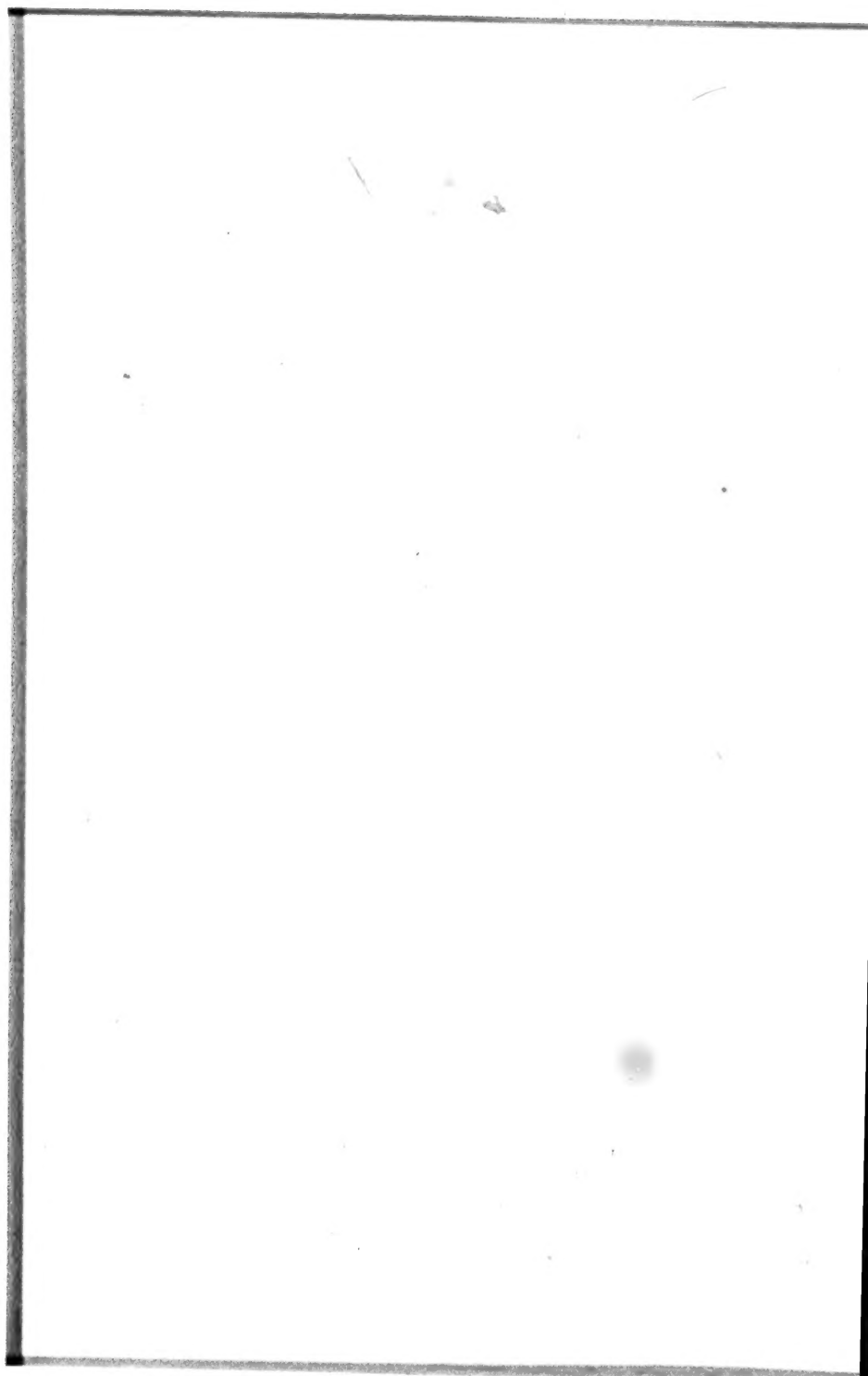
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IN THE
Supreme Court of the United States

October Term, 1972

No.

CAROLYN BRADLEY, *et al.*,

Petitioners,

VS.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The Petitioners, Carolyn Bradley, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 29, 1972.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is reprinted in the Appendix hereto *infra*, at pp. 34a-77a. The opinion of the District Court is reported at 53 F.R.D. 28, and appears in the Appendix hereto, *infra* at pp. 1a-33a.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 29, 1972. On February

21, 1973, Mr. Chief Justice Burger ordered that the time for filing a petition for Writ of Certiorari in this case be extended to March 29, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals err in reversing the District Court's award of attorneys' fees to successful plaintiffs in this school desegregation action?

Statutory Provisions Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983, 42 United States Code, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 718 of the Emergency School Aid Act of 1972, 86 Stat. 235, provides:

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Statement of the Case

This case was commenced in 1961 to desegregate the public schools of Richmond.

In March, 1964, after extended litigation, the District Court approved a "freedom of choice" plan proposed by the defendant school board. Plaintiffs appealed to the Fourth Circuit Court of Appeals, which affirmed the lower court's finding that freedom of choice satisfied the school board's constitutional obligations. *Bradley v. School Board of Richmond, Virginia*, 345 F.2d 310 (1965). Plaintiffs then petitioned this Court for a Writ of Certiorari to consider the constitutionality of the freedom of choice plan. On November 15, 1965, this Court declined to review the Fourth Circuit's decision regarding freedom of choice, but did grant plaintiffs certain additional relief regarding discrimination in the assignment of teaching personnel. 382 U.S. 103.

On March 30, 1966 the District Court approved a freedom of choice plan submitted by the parties. The plan expressly stated that freedom of choice would have to be modified if it did not produce significant results.

On May 27, 1968, this Court ruled that freedom of choice plans were not constitutionally permissible unless they actually brought about a unitary non-racial school system. *Green v. County School Board of New Kent County*, 391 U.S. 430.

On March 10, 1970 plaintiffs moved in the District Court for additional relief under *Green*. The defendant school board conceded that the freedom of choice plan under which it had been operating was unconstitutional. After considering a series of alternative and interim plans, the District Court on April 5, 1971, approved a plan for the integration of the Richmond schools involving pupil reassignments and transportation only within the city of Richmond. 325 F. Supp. 828. The defendant school board took no appeal from that decision.¹

On August 17, 1970, the District Court directed the parties to attempt to reach agreement on the matter of attorneys' fees. When the parties were unable to reach such an agreement, memoranda and evidentiary material were submitted to the court. On May 26, 1971, the District Court awarded plaintiffs attorneys' fees of \$43,355.00 as well as costs and expenses of \$13,064.65. On appeal the Fourth Circuit, Judge Winter dissenting, reversed the award of attorneys' fees.²

¹ The defendant City Council of Richmond filed a notice of appeal from that decision on April 29, 1971, but on the motion of the City Council that appeal was dismissed on May 13, 1971.

² Although the school board's notice of appeal mentions the awards of both attorneys' fees and costs, only the matter of attorneys' fees was briefed, and the Fourth Circuit's decision does not deal with the costs.

This Petition deals solely with the litigation concerning the schools *within* the city of Richmond. The subsequent orders of the District Court regarding Henrico and Chesterfield Counties, which are the subject of cases Nos. 72-549 and 72-550 in this Court, are not involved.

Reasons for Granting the Writ

1. The Decision Below is Inconsistent With the Decisions of This Court Regarding the Responsibility of State Officials to Dismantle Dual School Systems.

This Court has long recognized that in equitable actions such as this the courts have the authority and responsibility to award attorneys' fees to a prevailing plaintiff where such an award is consistent with "fair justice." *Sprague v. Ticonic National Bank*, 307 U.S. 164, 164-65 (1939); *Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1882). Compare *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 n.4 (1968). Pursuant to this rule, at least five circuits have held that legal fees must be paid in school civil rights cases to plaintiffs who should not have been compelled to resort to litigation to vindicate their clear rights. *McEnteggart v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971); *Horton v. Lawrence County Board of Education*, 449 F.2d 393 (5th Cir. 1971); *Monroe v. Board of Commissioners of City of Jackson*, 453 F.2d 259 (6th Cir.) *cert. denied* 406 U.S. 945 (1972); *Clark v. Board of Education of Little Rock School Dist.*, 449 F.2d 493 (8th Cir. 1971); *cert. denied* 405 U.S. 936 (1972); 369 F.2d 661 (8th Cir. 1966); *Kelly v. Guinn*, 456 F.2d 100 (9th Cir. 1972).

In March, 1964, the District Court in this case ordered the school board to implement a freedom of choice plan permitting black and white students to transfer to schools which had earlier been limited to pupils of the other race.

Plaintiffs appealed that order, urging that the school board should be required to go beyond freedom of choice to a plan which would actually result in a unitary school system. The Court of Appeals, however, affirmed the District Court, a majority of the court taking the position that the school board had satisfied its constitutional objections by granting all students "unrestricted freedom of choice as to schools attended," even if the choices resulted in voluntary segregation. 345 F.2d at 316. This Court declined to review that judgment by Writ of Certiorari. 382 U.S. 103 (1965). The appellate proceedings, however, made it clear that the school board's legal responsibilities were not limited to complying with the 1964 freedom of choice plan. This Court directed that the District Court consider the impact of faculty segregation on the adequacy of any desegregation plans, expressly declined to approve the merits of the 1964 plan, and cautioned the defendants that delays in desegregating school systems were no longer tolerable. 382 U.S. at 105. Two of the five Fourth Circuit judges expressly cautioned the school board that the plan should be reviewed and reappraised to see if it was working, and reminded it "that the initiative in achieving desegregation of the public schools must come from the school authorities." 345 F.2d at 322-324.

On March 30, 1966, the District Court ordered into effect a new desegregation plan which went beyond that of 1964 in several respects. The plan provided that it must be evaluated "in terms of results," and that if the steps taken by the school board did not produce "significant results . . . the freedom of choice plan will have to be modified with consideration given to other procedures such as boundary lines in certain areas." Teachers and other staff were to be assigned so that no school was identifiable as intended for students of a particular race. The school

board was forbidden to construct new schools or expand old ones in a way designed to perpetuate or support racial segregation.

Two years later, on May 27, 1968, this Court unanimously condemned freedom of choice plans which did not have the effect, in fact, of dismantling the pre-existing dual school system. *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430. The Court expressly rejected the argument, relied on earlier by the Fourth Circuit in approving the 1964 Richmond plan, that a school board could completely discharge its constitutional obligations by merely "adopting a plan by which every student, regardless of race, may 'freely' choose the school he will attend." 391 U.S. at 437. Those obligations required that each State eliminate "root and branch" the racial identification of its schools which had arisen under State sponsored segregation. 391 U.S. at 435, 438. *Green* stated unequivocally that school boards could not sit idly by maintaining unconstitutional school systems until and unless litigation was commenced against them. 391 U.S. at 438-439.

The message of *Green* can hardly have been missed by the respondent school board in the instant case. The Fourth Circuit panel reversed in *Green* was virtually the same as that which had earlier upheld Richmond's freedom of choice plan, the relevant opinions were written by the same judge, and the 1967 decision reversed by this Court had relied on the earlier decision in this case.³ New

³ *Green*, reported at 382 F.2d 338, was a per curiam decision relying on a decision the same day in *Bowman v. County School Board of Charles City County*, 382 F.2d 326 (4th Cir. 1967). The Fourth Circuit's earlier decision approving free choice in *Bradley* was cited at 382 F.2d 327, n.2. Judges Haynsworth, Boreman and Bryan were in the majority in both *Bradley* and *Bowman*, joined in *Bowman* by Judge Craven who had been appointed subsequent to the 1965 *Bradley* decision.

Kent County itself is located less than 15 miles from the City of Richmond.

Despite the indisputable illegality of Richmond's freedom of choice plan under *Green*, and despite *Green's* command that school boards seize the initiative in meeting their constitutional responsibilities, the Richmond school board made no effort to change its system to comply with the law. When the school board had persisted in defiance of *Green* for almost two years, plaintiffs and their counsel were forced once again to assume the burdens of protracted litigation to gain the constitutional rights to which they were clearly entitled.

After plaintiffs moved on March 10, 1970, for additional relief, the District Court's findings showed the school board was not merely in violation of *Green*, but of the 1966 court order as well. The court found that "there was generally little change in the racial composition of the schools from the inception of the freedom of choice plan" to 1970. *Bradley v. School Board of City of Richmond, Virginia*, 317 F. Supp. 555, 561 (E.D. Va. 1971). Three of seven high schools were more than 90% black. Of nine middle schools, 3 were over 99% black and 3 were over 90% white. There were 17 all black elementary schools, and another 4 over 99% black, with 15 elementary schools over 90% white. *Bradley v. School Board of City of Richmond, Virginia*, 317 F. Supp. at 560; 338 F. Supp. 55, 71-72 (E.D. Va. 1972). Despite the 1966 order, 45 of 66 schools had faculty and staff in excess of 90% white or 90% black. 338 F. Supp. at 72. See also 317 F. Supp. at 560-561. The District Court found, "Under the freedom of choice plan governing Richmond's schools through 1969-70, the faculties of many schools were plainly segregated. This fact, standing alone, contributed to the racial identifiability of schools, and in all probability it also impaired

the process of student body desegregation by personal initiative." *Bradley v. School Board of City of Richmond, Virginia*, 325 F. Supp. 828, 838 (E.D. Va. 1971). Regarding school construction, also governed by the 1966 decree, the District Court found: "School construction policy has contributed substantially to the current segregated conditions. Schools have been built and attendance policies maintained so that, even *within* existing school divisions and by comparison with the racial ratios prevailing therein, new or expanded facilities were racially identifiable. The evidence shows that this was purposeful, its immediate and intended result was the prolongation and attempted perpetuation of segregation *within* school divisions." 338 F. Supp. at 86 (emphasis added).

When the school board was brought back into court by plaintiffs in March of 1970, the board could offer no justification for the system it had been operating for nearly two years in defiance of *Green*. On March 12, 1970 the District Court ordered the defendants to state whether they maintained the Richmond schools were being run in accordance with the Constitution. On March 19 the defendants filed a statement that they "had been advised" the school system was not a unitary one. On March 31, after the District Court inquired whether this advice had been accepted, the school board conceded that the school system was operating in a manner contrary to constitutional requirements. 317 F. Supp. at 558.

The District Court based its award of legal fees in large measure on the failure of the school board for almost two years to satisfy its affirmative obligations under *Green*. See pp. 20a-25a; see also 317 F. Supp. at 560. That court reasoned:

School desegregation decisions illustrate the specific application of a court's equitable discretion to allow

counsel fees to plaintiffs when the evidence shows obstinate noncompliance with the law or imposition by defendants on the judicial process for purposes of harassment or delay in affording rights clearly owing. . . .

A prior appellate opinion in this case states that district courts should properly exercise their power to allow counsel fees only 'when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obstinate obduracy.' *Bradley v. School Board of City of Richmond*, *supra*, 345 F.2d at 321. . . .

The Court has already reviewed the course of litigation. It should be apparent that since 1968 at the latest the School Board was clearly in default of its constitutional duty. When hailed into court, moreover, it first admitted its noncompliance, then put into contest the responsibility for persisting segregation. When liability finally was established, it submitted and insisted on litigating the merits of so-called desegregation plans which could not meet announced judicial guidelines. At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order. . . .

The freedom of choice plan under which Richmond was operating clearly was one such. When this Court filed its opinion of August 17, 1970, confirming the legal invalidity of that plan, the HEW proposal, and the interim plan, it was not propounding new legal doctrine. Because the relevant legal standards were clear it is not unfair to say that the litigation was unnecessary. It achieved, however, substantial delay in the

full desegregation of city schools. Courts are not meant to be the conventional means by which person's rights are afforded. The law favors settlement and voluntary compliance with the law. When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes.

It is no argument to the contrary that political realities may compel school administrators to insist on integration by judicial decree and that this is the ordinary, usual means of achieving compliance with constitutional desegregation standards. If such considerations lead parties to mount defenses without hope of success, the judicial process is nonetheless imposed upon and the plaintiffs are callously put to unreasonable and unnecessary expense. Pp. 20a-22a.

The Court of Appeals did not disturb the District Court's findings of fact regarding the school board's conduct prior to plaintiffs' 1970 motion for further relief. Nor did the Fourth Circuit question the rule applied by the District Court that legal fees should be allowed where a school board forces private citizens to resort to litigation to vindicate their clear right to a unitary school system. Rather, the appellate court excused the failure of the defendants to dismantle an admittedly illegal dual school system because (1) the school board had received no complaints from plaintiffs or others, and (2) the school board faced "vexing uncertainties" in framing a new plan of desegregation. Pp. 40a-41a. The all too predictable impact of this part of the Fourth Circuit's decision reaches far beyond the problems of legal fees or the boundaries of the city of Richmond.

For almost two decades this Court has admonished school boards to seize the initiative in bringing their systems into compliance with the Constitution. In *Brown II*⁴ the Court stated that full implementation of the constitutional principles enunciated in *Brown I*⁵ might "require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems." 349 U.S. at 299. (emphasis added) In *Cooper v. Aaron* the Court explained that under *Brown II* school authorities were "duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." 358 U.S. 1, 7 (1958). In *Green v. County School Board of New Kent County* the Court reaffirmed that school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary school system in which racial discrimination would be eliminated root and branch. . . . [I]t was to this end that *Brown II* commanded school boards to bend their efforts . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." 391 U.S. at 437-439 (1968); See also *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971). The cautious pace of "all deliberate speed" announced in *Brown I* has long since given way to a call for immediate action. In 1963 and 1964 this Court announced that the context which surrounded the standard of *Brown I* had long since changed. *Goss v. Board of Education*, 373 U.S. 683, 689 (1963); *Calhoun v. Latimer*, 377 U.S. 263, 264-65 (1964). *Griffin v. School Board* announced "[T]he time for mere deliberate speed has run out. . . ." 377 U.S. 218, 234 (1964). Seven years ago, in this very

⁴ *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

⁵ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

case, the Court declared, "Delays in desegregating school systems are no longer tolerable." *Bradley v. School Board of Richmond*, 382 U.S. 103, 105 (1965). The command in *Green* for integration now has been reiterated in subsequent decisions. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 13-14 (1971).

This Court's long standing command that school boards seize the initiative in desegregating their schools is now a dead letter in the Fourth Circuit. School authorities in the five states therein are permitted under the decision of the Court of Appeals to continue operating dual school systems unless they are pressed with complaints and know exactly what desegregation plan they should implement. This rule is on its face plainly inconsistent with the opinions of this Court. Few students or parents without the assistance and protection of counsel will brave the community pressures against those who protest segregation. Compare *Green v. County School Board of New Kent County*, 391 U.S. 430, 440 n.5 (1968). Virtually any school district will be able to claim that, in view of the complex problems of pupil assignment, transportation, school construction and financing, it, like the Richmond school board, could not foresee the precise plan which would be approved by the courts if litigation were commenced. Compare *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Under the Court of Appeals' decision in this case, it is difficult to imagine any circumstances in which a school board in the Fourth Circuit could be said to have an affirmative obligation to integrate its schools without awaiting litigation.

The sweep of the Fourth Circuit's rule is well illustrated by the facts of this case. It has never been claimed, and no court has ever held, that the *actual* reason the school

board took no action in the face of *Green* in 1968 was that it had no complaints or did not know what to do. The school board never asserted that it spent the 22 months after *Green* trying to formulate a new desegregation plan; once litigation commenced, the board was able to devise its first proposed plan in 41 days, and its second in 27. On the contrary, as late as March, 1970 the school board was still equivocating as to the meaning of *Green*, pp. 2a-3a, and the District Court found that the general attitude of the authorities was that they would take no steps to establish a unitary school system except under court order. P. 21a. Whatever "uncertainties" existed before or after *Swann* were as to the tools which the courts could use when state officials failed to comply with the law. The tools available to school officials themselves are limited only by their imagination and practical considerations; school boards have always been free to adopt any techniques which worked, even though some might be beyond the power of the federal courts to order. Compare *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971). The goal to be achieved has always been clear—the creation of a unitary school system. Compare *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). Any uncertainty on the part of the board as to how to achieve a unitary system cannot excuse the board's decision not to try to achieve such a system at all.

When this Court first condemned segregation on the basis of race in *Brown I* some 19 years ago, school authorities in more than half a dozen states were operating dual school systems. Had those authorities stepped forward on their own initiative and begun to integrate their schools, the goals of *Brown I* would have been achieved long ago. Instead, however, many if not most school

boards decided to continue to operate dual school systems until and unless they were sued by black students and their parents. Explaining the circumstances that forced plaintiffs to initiate the instant litigation, the Court of Appeals noted a decade ago:

Nearly nine years have elapsed since the decisions in the *Brown v. Board of Education* cases and since the Supreme Court held racial discrimination in the schools to be unconstitutional. The Richmond school authorities could not possibly have been unaware of the results of litigation involving the school systems of other cities in Virginia, notably Norfolk, Alexandria, Charlottesville and Roanoke. Despite the knowledge which the authorities must have had as to what was happening in other nearby communities, the dual attendance areas and 'feeder' system have undergone no material change. 317 F.2d 429, 437 (4th Cir. 1963)

As Judge Winter noted last year, "Almost all of the burden of litigation has been upon the aggrieved plaintiffs and those non-profit organizations which have provided them with representation." *Brewer v. School Board of Norfolk, Virginia*, 456 F.2d 943, 954 (4th Cir. 1972) (concurring opinion) So long as state authorities persist in such conduct, the meager resources available to private litigants will be inadequate to deal with the resulting constitutional violations.

Nearly two decades after *Brown I*, recalcitrant state officials should not be permitted to force unwilling victims of illegal discrimination to bear the constant and crushing expense of enforcing their constitutionally accorded rights. *Clark v. Board of Education of Little Rock School Dist.*, 499 F.2d 493 (8th Cir. 1971) cert. denied 405 U.S. 936 (1972); 369 F.2d 661 (8th Cir. 1966). "The time is now

when those who vindicate these civil rights should receive fair and equitable compensation from the sources which have denied them, even in the absence of any showing of 'unreasonable, obdurate obstinacy.'" *Brewer v. School Board of Norfolk, Virginia*, 456 F.2d 943, 954 (4th Cir. 1972) (Winter, J., concurring) *cert. denied* 406 U.S. 933 (1972). This Court should grant the Writ sought and reaffirm that the duty to take affirmative action to dismantle dual school systems applies to school officials in the Fourth Circuit as well as to those in the rest of the country. That responsibility should be enforced by requiring that parents and students who are still compelled at this late date to resort to litigation to obtain their well established rights be paid costs and attorneys' fees by the recalcitrant school board.

2. The Decision Below Conflicts With the Decisions of Other Courts of Appeals and of District Courts as to Whether Legal Fees Should Be Awarded to Private Parties Suing to Enforce Important Congressional and Constitutional Policies.

The District Court further grounded its award of attorneys' fees on its conclusion that full and appropriate relief in school desegregation cases under 42 U.S.C. § 1983 should include such awards. Referring to this Court's reasoning in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the District Court held with regard to school desegregation litigation:

The private lawyer in such a case most accurately may be described as 'a private attorney general.' Whatever the conduct of the defendants may have been, it is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy of nondiscrimination as to a large proportion of

citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof. The fulfillment of constitutional guarantees, when to do so profoundly alters a key social institution and causes reverberations of untraceable extent throughout the community is not a private matter. Pp. 27a-28a.

The District Court noted that, despite the public importance of this type of litigation, it was the sort of enterprise "on which any private individual should shudder to embark" in view of the cost and difficulty of proving a case for injunctive relief, the unlikelihood of damages, and possible hostility toward counsel involved in such unpopular causes. P. 24a. The court felt it particularly inappropriate that officials should be permitted to spend large sums to defend unsuccessfully an unconstitutional school system and then refuse to pay the expenses incurred by the plaintiffs in forcing the State into compliance with the law. P. 32a. The court concluded that it should exercise its broad equitable powers under Section 1983 to adopt in this case the standard set in *Newman v. Piggie Park* and award legal fees "unless special circumstances would render such an award unjust." P. 28a.

The Fourth Circuit, reversing, held that, in the absence of an express statutory authorization, no court could award attorneys fees to a private litigant merely because he had successfully sued to effectuate an important Congressional or Constitutional policy. Pp. 51a-60a. The Fourth Circuit relied heavily on the absence of any express authorization of legal fees for school desegregation cases in 42 U.S.C. § 1983 or the 1964 Civil Rights Act, 42 U.S.C. § 2000 c-7, reasoning that such an omission must reflect a purposeful decision by the Congress not to sanction attorney's

fees for enforcing that statute involved. Pp. 54a-55a. Noting that this Court had recently awarded legal fees in the absence of express statutory authority in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the Fourth Circuit held that fees had been awarded in *Mills* solely because the plaintiff-stockholder there had benefitted other stockholders by forcing the accurate disclosure of the relevant terms in a proposed corporate merger. The court rejected the suggestion that the result in *Mills* was based on any effect the litigation might have had in enforcing the public policies contained in the Securities Exchange Act. Pp. 55a-56a. The Court of Appeals noted that any rule sanctioning legal fees for enforcing important public policies might lead to the award of such fees in reapportionment, environmental protection or First Amendment cases. P. 56a. Unwilling to reach such a conclusion, the Fourth Circuit refused to permit the award of attorneys' fees to private litigants merely because they had functioned as private attorneys general.

The rule adopted by the District Court and rejected by the Court of Appeals has been expressly approved by two Courts of Appeals, one three judge court, and six District Courts in eleven different decisions.

In *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (1971), the Fifth Circuit directed the award of legal fees on the ground that the plaintiff there had effectuated important policies by obtaining an injunction against housing discrimination. Quoting this Court's opinion in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), the court concluded:

We think the factors relied on in *Piggie Park* in interpreting the provision for awarding attorney's fees apply also to suits under § 1982. The policy

against discrimination in the sale or rental of property is equally strong. The statute, under present judicial development, depends entirely on private enforcement. Although damages may be available . . . in many cases, there may be no damages or damages difficult to prove. To ensure that individual litigants are willing to act as 'private attorneys general' to effectuate the public purposes of the statute, attorney's fees should be available as under 42 U.S.C. § 3612(c).⁶ 444 F.2d at 147-48.

The reasoning in *Lee* was in no way limited to housing discrimination suits under § 1982. The Fifth Circuit subsequently applied the same *Newman* standard for legal fees in an employment discrimination case against the City of Atlanta, stating simply "There is no relevant distinction between a section 1982 suit and a section 1981 suit such as this one." *Cooper v. Allen*, 467 F.2d 836, 841 (5th Cir., 1972).⁷ A more recent district court decision applying *Lee* and *Cooper* reached the obvious conclusion that "[i]t would be equally difficult to distinguish § 1981 and § 1982 suits from § 1983 suits, such as this one"; adopting the *Newman* standard and finding no special circumstances which would render an award unjust, the court directed the payment of legal fees to the plaintiff in a section 1983 action in order to encourage litigation "to vindicate the federal rights of our citizens." *Jinks v. Mays*, 350 F. Supp. 1037, 1038 (N.D. Ga. 1972). In *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1971) a § 1983 reapportionment case, the three judge panel also awarded legal fees on the grounds rejected by the Fourth Circuit in this case:

⁶ This is the statute involved in *Newman*.

⁷ Six Fifth Circuit judges participated in *Lee* and *Cooper*. Another Fifth Circuit panel appears to have taken a position inconsistent with *Lee* and *Cooper* in *Johnson v. Coombs* (5th Cir., No. 72-3030, opinion dated December 6, 1972).

In instituting the case *sub judice* plaintiffs have served in the capacity of "private attorneys general" seeking to enforce the rights of the class they represent. See generally *Newman v. Piggie Park Enterprises*. . . . If, pursuant to this action, plaintiffs have benefitted their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. See *Mills v. Electric Auto-Lite Co.* . . . Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits, *id.*, and to carry out congressional policy. 340 F. Supp. at 694.

Within the Fifth Circuit, legal fees for private attorneys general have also been awarded in *Ford v. White*, (S.D. Miss., Civil Action No. 1230(N), opinion dated August 4, 1972), *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), and *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

The rule applied by the District Court in this case has also been adopted in the First Circuit. Reversing a denial of legal fees in a § 1982 housing discrimination case, that court of appeals cited *Newman* and *Lee* and explained:

The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication, as the case at bar illustrates. If a defendant may feel that the cost of litigation, and particularly that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate

wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.

Knight v. Auciello, 453 F.2d 852, 853 (1972).

Legal fees for private attorneys general have recently been sanctioned by district courts in the Eighth and Ninth Circuits. In *La Raza Unida v. Volpe*, the court, relying on the Fifth Circuit decision cited above, explained:

The rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney-general" should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential. (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972).

See also *Ross v. Goshi*, (D. Hawaii, Civil No. 72-3610, opinion dated December 8, 1972); *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971).

The Fourth Circuit's decision is openly critical of the Fifth Circuit's opinion in *Lee v. Southern Home Sites Corp.*, pp. 55a n.47 and 58a and expressly disapproves the result reached by the three judge court in *Sims v. Amos*, p. 53a. In turn, six of the decisions approving legal fees for private attorneys general expressly rely on the very district court decision reversed by the Fourth Circuit in this case, *Bradley v. School Board of the City of Richmond, Virginia*, 53 F.R.D. 28 (E.D. Va. 1971). *La Raza Unida v. Volpe*, (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972); *Ford v. White*, (S.D. Miss., Civil Action

No. 1230(N), opinion dated August 5, 1972); *Ross v. Goshi*, (D. Hawaii, Civil No. 72-3610, opinion dated December 8, 1972); *Wyatt v. Stickney*, 344 F. Supp. 387, 409 (M.D. Ala. 1972); *NAACP v. Allen*, 340 F. Supp. 703, 710 (M.D. Ala. 1972); *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala. 1972). Although the Fourth Circuit expressly disapproved legal fees for private attorneys general in reapportionment, First Amendment, and environmental protection cases, other courts outside that circuit have awarded such fees in just such cases. *La Raza Unida v. Volpe*, (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972 (environmental protection)); *Ross v. Goshi*, (D. Hawaii, Civil No. 72-3610), opinion dated December 8, 1972) (First Amendment); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972) (reapportionment).

At least five decisions have considered and rejected the Fourth Circuit's argument that the mere absence of an express authorization of legal fees precludes such fees for private attorneys general, at least in civil rights cases. In *Lee v. Southern Home Sites Corp.*, the Fifth Circuit distinguished *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967) relied on below, p. 54a, noting that, like section 1983, section 1982 "is not a statute providing detailed remedies, and thus the policy of effectuating Congressional purpose does not militate against an award of attorney's fees." 444 F.2d 143, 145 (1971). In *Ross v. Goshi* the court held:

The statutes which are the basis of relief on the merits do not specifically provide for the awarding of fees, and the general rule is that fees are not recoverable absent an express authorization. The courts have, however, . . . recognized that "whenever there is nothing in a statutory scheme might be interpreted as precluding it, a private attorney should be awarded at-

torneys' fees . . ." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1968), cited by Defendants, is not to the contrary. That case involved an area of the law . . . where Congress has prescribed such "intricate remedies" that the absence of statutory authorization for attorneys' fees must be read as an intent to prohibit such awards. Section 1983, on the other hand, is not a statute providing detailed remedies, and there is no reason to infer any congressional intent to limit the otherwise broad equitable powers of this court. (D. Hawaii, Civil No. 72-3610, opinion dated December 8, 1972).

NAACP v. Allen held, "With regard to an award of attorneys' fees, it is of no consequence that 42 U.S.C. § 1983, the statute under which plaintiffs filed this suit, is silent on the availability of such an award." 340 F. Supp. 703, 709-710, n.7 (M.D. Ala. 1972). In *Sims v. Amos* the three judge panel similarly concluded "It is of no consequence that the statute under which plaintiffs filed this suit, 42 U.S.C. § 1983, is silent on the availability of attorneys' fee." 340 F. Supp. 691, 695 (M.D. Ala. 1972). The conclusions reached by the Fourth Circuit in this regard are clearly at odds with this Court's recent holding that the mere absence of a provision for attorneys fees does not evince "a purpose to circumscribe the courts' power to grant appropriate remedies." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970).

Although the Fourth Circuit barred legal fees to private attorneys general under § 1983 because that section makes no express reference to such fees, at least six decisions have actually awarded legal fees to private attorneys general suing to enforce that very section. *Ross v. Goshi*, (D. Hawaii, Civil No. 72-3610, opinion dated December 8,

1972); *Ford v. White*, (S.D. Miss., Civil Action No. 1230(N), opinion dated August 4, 1972); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972); *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971).⁸

In awarding legal fees in *Mills v. Electric Auto-Lite Co.*, this Court relied, not only on the benefit which the plaintiffs there had conferred on the corporation and stockholders involved, but also on "the stress placed by Congress on the importance of fair and informed corporate suffrage," and the fact that litigation provided "an important means of enforcement of the proxy statute." 396 U.S. 375, 396. Despite this language, the Fourth Circuit held that the result in *Mills* was based on "conferral of benefits, not policy enforcement." P. 55a. Two of the federal courts sanctioning legal fees for private attorneys general have read *Mills* differently, concluding that the language quoted authorizes legal fees for enforcing important public policies. In *Lee v. Southern Home Sites*, 444 F.2d 143, 145 (1971), the Fifth Circuit held that the decision in *Mills* "is better understood as resting heavily on its acknowledgment of 'overriding considerations' that private suits are necessary to effectuate congressional policy and that awards of attorney's fees are necessary to encourage private litigants to initiate such suits." The court in *La Raza Unida v. Volpe*, concluded that *Mills* authorized legal fees either when a benefit was conferred or important policies effectuated. "*Mills*, then, represents both the defensive and offensive use of

⁸ The fact that Congress did not mention legal fees in school desegregation cases when it enacted the 1964 Civil Rights Act cannot limit the broad authority to provide full relief in such cases conferred upon the courts in 1871 with the enactment of 42 U.S.C. §1983. Furthermore, no judicial remedies with respect to school desegregation were created by the 1964 Act. Compare *Newman v. Piggie Park Enterprises*, supra.

the Court's equitable powers. Defensive, to prevent unjust enrichment of free riders and offensive, to promote the effective implementation of the Congressional objective of fair and informed corporate suffrage." (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972). The construction of *Mills* in *Lee* and *La Raza Unida* is clearly inconsistent with that stated by the Fourth Circuit.

The Fourth Circuit sought to minimize the obvious conflict between its own decision and those in other circuits by urging "in all the cases where the right to make an award for policy reasons has been stated, it has been stated simply as an alternative ground to a finding of unreasonable obduracy," p. 59a, n.56. This is simply incorrect. In three of the private attorney general cases noted above the court expressly found there was *not* unreasonable obduracy. *La Raza Unida v. Volpe*, (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972;⁹ *Ford v. White*, (S.D. Miss., Civ. No. 1230(N), opinion dated August 5, 1972);¹⁰ *Jinks v. Mays*, 350 F. Supp. 1037, 1038 (N.D. Ga. 1972).¹¹ In four decisions awarding attorneys fees to private litigants enforcing important congressional policies, the courts made no finding either way regarding obduracy by the defendants. *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 853 (1st Cir. 1972);

⁹ "*La Raza* involved complicated legal questions; by no means were the duties of the state clear, and the court reaffirms its earlier findings that the State Highway Department did not behave in bad faith [D]efendants' errors and conduct falls short of obdurate behavior."

¹⁰ "The plaintiffs do not base their claim for attorneys' fees on any bad faith or unreasonableness on the part of the defendants. From the outset, the defendants and their attorney worked closely with the attorneys for the plaintiffs as is evidence by the final resolution of this case by a Consent Decree."

¹¹ "In its written opinion the Fifth Circuit pointed out that the record in this case is devoid of evidence of any bad faith or unlawful motive on the part of defendants."

Ross v. Goshi, (D. Hawaii, Civil No. 72-3610, opinion dated December 8, 1972); *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971). In four of the private attorney general cases the court did find the defendants guilty of unreasonable conduct. In each of these decisions, however, the court carefully stated that it was basing its decision not on this conduct, but on the more general rule announced favoring legal fees for private litigants effectuating public purposes. *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 144 (5th Cir. 1971);¹² *Wyatt v. Stickney*, 344 F. Supp. 387, 408 (M.D. Ala. 1972);¹³ *NAACP v. Allen*, 340 F. Supp. 703, 708 (M.D. Ala. 1972);¹⁴ *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala. 1972).¹⁵

Plaintiffs would urge that the District Court in this case, and the eleven decisions agreeing with it, correctly conclude that the inherent equitable powers of the courts include the authority to award legal fees to a private litigant who has succeeded in effectuating an important congressional or constitutional policy. The integration of public schools is one of the most vital of those policies, and the burden of such litigation has been borne largely by private parties, *Brewer v. School Board of Norfolk, Virginia*, 456 F.2d 943, 954 (4th Cir. 1972) (concurring opinion.) The question of legal fees for private attorneys general in cases such as this is a matter of substantial and growing importance; although the idea was largely

¹² "We base our holding, however, on a broader ground."

¹³ "A second, and more appropriate, justification for the Court's award. . . ."

¹⁴ "This court, however, feels that the attorneys' fee award should be premised on a broader basis than defendants' bad faith."

¹⁵ "Nevertheless, a finding of bad faith is not always a prerequisite to the taxing of attorneys' fees against defendants, and in this case, despite the availability of that ground, the Court has decided to base its award on far broader considerations of equity."

undeveloped prior to this Court's decision in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), the propriety of awarding such fees was decided in three lower court cases in 1971 and 10 in 1972. The problem is not limited to legal fees in school cases—attorneys' fees have been awarded to private attorneys general in cases involving reapportionment,¹⁶ free speech,¹⁷ environmental protection,¹⁸ housing relocation,¹⁹ jury discrimination,²⁰ discrimination in public employment,²¹ discrimination in the sale or rental of housing,²² conditions in institutions for the retarded and mentally ill,²³ adequacy of medical facilities in prisons,²⁴ and discriminatory prosecution and police harassment.²⁵ Although attorneys' fees for private attorneys general are forbidden in the Fourth Circuit absent an express statutory authorization, such fees are actually being awarded in the First, Fifth, Eighth and Ninth Circuits. Only this Court can establish a uniform Federal rule regarding this question.

¹⁶ *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972).

¹⁷ *Ross v. Goshi* (D. Hawaii, Civ. No. 72-3610, opinion dated December 8, 1972).

¹⁸ *La Raza Unida v. Volpe* (N.D. Cal., No. C-71-1166 RFP, opinion dated October 19, 1972).

¹⁹ *Id.*

²⁰ *Ford v. White* (S.D. Miss., No. Civ. 1230(N), opinion dated August 4, 1972).

²¹ *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972).

²² *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Knight v. Auciello*, 453 F.2d 853 (1st Cir. 1972).

²³ *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972).

²⁴ *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972).

²⁵ *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971).

3. The Decision Below Conflicts With the Decisions of This Court and Other Courts of Appeals as to When Legal Fees Should Be Awarded to Plaintiffs Who Have Secured Relief Benefitting a Class.

For almost a century this Court has sanctioned the award of attorneys' fees to a plaintiff who has successfully maintained a suit that benefits a group of others in the same manner as himself. *Trustees v. Greenough*, 105 U.S. 527, 531-537 (1882). The foundation for this practice is the original authority of the chancellor to do equity in a particular situation. *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161 (1939). To allow the others to obtain full benefit from the plaintiffs' efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiffs' expense. In its most recent re-statements of this doctrine, this Court held that legal fees should be awarded even though the litigation had not created a fund from which those expenses could be deducted. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392-93 (1970); *Sprague v. Ticonic Nat. Bank*, 301 U.S. 161, 166 (1939).

In the instant litigation plaintiffs seek legal fees *inter alia* on the ground that their successful effort to integrate the Richmond schools benefitted a large group other than themselves. The beneficiaries include not only the many thousands of black public school students spared the consequences of an inherently unequal separate education, but also the white students involved. Compare *Trafficante v. Metropolitan Life Insurance Company*, 41 U.S. Law Week 4071 (1972). The most appropriate device for sharing the cost of plaintiffs' successful litigation among all the student beneficiaries is to impose that cost on the school board, since the board's funds are raised from the entire population and are to be used for the benefit of

Richmond's school children. Compare *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 393-94 (1970).

While this appeal was pending the Fourth Circuit announced its interpretation of *Mills*, *Sprague* and *Greenough* in *Brewer v. School Board of City of Norfolk, Virginia*, 456 F.2d 943, cert. denied 406 U.S. 933 (1972). In *Brewer* the plaintiffs obtained in the district court a substantial restructuring of Norfolk's school system, including the pairing and clustering of schools and the reassignment of large numbers of students. On appeal the Fourth Circuit also directed, at plaintiff's behest, that the school board furnish free transportation to students who were not within walking distance of their new schools. 456 F.2d 943, 946-948. The Fourth Circuit awarded attorneys fees for plaintiffs' efforts in obtaining free transportation, on the ground that the benefit involved was "pecuniary" in nature. 456 F.2d 943, 951-52. Since the benefits of an integrated education also obtained by plaintiffs for the class were not deemed pecuniary, legal fees for this aspect of the litigation were denied.²⁶

In the instant case the benefit claimed to have been conferred by plaintiffs on the class of students was precisely the type of benefit rejected as not pecuniary in *Brewer*—an integrated education. Accordingly, the Fourth Circuit held that, under *Brewer*, legal fees could only be obtained in this case on a showing that the school officials had shown unreasonable, obdurate obstinacy. Pp. 35a and 54a.

The requirement of *Brewer*, applied in this case, that legal fees for benefitting a class only be awarded for bene-

²⁶ On remand the district court awarded attorneys fees for legal services in securing free transportation, but awarded no fees for the far more extensive services which resulted in Norfolk's general desegregation plan. Unreported opinion of Judge MacKenzie dated January 22, 1973.

fits of a pecuniary nature, is completely at odds with the decisions of this Court and lower federal courts. In *Mills v. Electric Auto-Lite Co.* this Court expressly reputed any such requirement that the benefit be pecuniary:

The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into court as a prerequisite to the court's power to order reimbursement of expenses. . . . [A]n increasing number of lower courts have acknowledged that a corporation may receive a 'substantial benefit' from a derivative suit, *regardless of whether the benefit is pecuniary in nature*. . . . [I]t may be impossible to assign monetary value to the benefit. Nevertheless . . . petitioners have rendered a substantial service to the corporation and its shareholders. 396 U.S. at 392, 395-396. (Emphasis added)

Taking this unambiguous language to mean what it said, the Court of Appeals for the District of Columbia recently awarded legal fees in another case on the ground, *inter alia*, that "[T]he Supreme Court made clear in *Mills* that the judicial power to award counsel fees does not depend upon . . . whether the benefit conferred is pecuniary in nature." *Yablonski v. United Mine Workers of America*, 466 F.2d 424, 431 n.10 (1972). See also *La Raza Unida v. Volpe*, (N.D. Cal., October 19, 1972, No. C-71-1166 RFP opinion dated October 19, 1972) ("*Mills* extended the scope of the common-fund justification for the awarding of fees

by holding that no *pecuniary benefit* need be demonstrated.")

Relying on this Court's opinion in *Mills*, Federal courts have repeatedly awarded legal fees under circumstances not involving the "pecuniary benefit" required by the Fourth Circuit. In *Yablonski v. United Mine Workers of America*, attorneys' fees were awarded for four successful lawsuits aimed at guaranteeing free and fair elections within a labor union. 466 F.2d 424 (D.C. Cir., 1972). Legal fees have also been awarded in litigation regarding constitutionally inadequate medical facilities for prisoners and discrimination in public housing, *Hammond v. Housing Authority*, 328 F. Supp. 586 (D. Ore. 1971); *Newman v. State of Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972). See also *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972); *Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972); *Sincock v. Obara*, 320 F. Supp. 1098 (D.Del. 1970). Decisions awarding legal fees to plaintiffs who both effectuate public policies and benefit others have done so for such non-pecuniary benefits as legislative reapportionment, *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972) and ending jury discrimination, *Ford v. White*, (S.D. Miss., Civ. Act. No. 1230 (N); opinion dated August 4, 1972).

The Fourth Circuit's disagreement with *Mills* and its progeny is thinly veiled at best. *Mills* itself is characterized as "an uneasy half-way house" between "the traditional position" and "universal fee shifting from the successful party." P. 59a. *Lee* is described as sanctioning "excessive judicial discretion that may emasculate the general rule against fee awards and inject more unpredictability into the judicial process." P. 58a. The Court of Appeals expressly opposed a rule allowing awards in reapportionment cases, while noting that just such an award had been made in *Sims*. P. 57a. The very District Court decision reversed

by the Fourth Circuit in this case, awarding legal fees to the instant plaintiffs, was cited with approval by two of the federal courts approving legal fees for non-pecuniary benefits under *Mills. Ford v. White*, (S.D. Miss., No. Civ. 1230 (N), opinion dated August 4, 1972)); *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala. 1972).

Only this Court can end the confusion and inconsistency which plainly exists as to whether, particularly in civil rights cases, legal fees can be awarded to plaintiffs who benefit others in a non-pecuniary manner.

4. The Decision Below Conflicts With the Decision of This Court as to When Federal Statutes Must be Applied Retroactively.

While the legal fees portion of this litigation was pending on appeal, Congress enacted new legislation mandating the award of legal fees in school desegregation cases. Section 718 of the Emergency School Aid Act of 1972, which became effective on July 1, 1972, provides:

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Plaintiffs brought this statute to the attention of the Court of Appeals and urged that it entitled them to legal fees in the instant case.

After an *en banc* hearing the Fourth Circuit refused to apply section 718 to legal services rendered prior to June 30, 1972. P. 61a. In a companion case, *Thompson v. School Board of the City of Newport News*, the Court explained tersely, and without citation, that this result was compelled by "the principle that legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the statute applied in that manner." (No. 71-2032, opinion dated November 29, 1972). Pp. 78a-81a.

The origin of the "principle" relied on by the Court of Appeals is not explained. The Fourth Circuit's principle appears to be the very same principle announced by the Supreme Court of North Carolina five years earlier: "The First rule of construction is that legislation [and directives] must be considered as addressed to the future, not the past. . . . [A] retrospective operation will not be given to a statute [or directive] which interferes with antecedent rights unless such be 'the unequivocal and inflexible import of its terms, and the manifest intention of the legislature.'" ²⁷

The principle of the North Carolina Supreme Court, apparently revived by the Fourth Circuit, was unanimously rejected by this Court on certiorari. The general rule, the Court stated in *Thorpe v. Housing Authority of Durham*, "is that an appellate court must apply the law in effect at the time it renders its decision. . . . 'A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law' . . .

²⁷ *Housing Authority of City of Durham v. Thorpe*, 271 N.C. 468, 470, 157 S.E. 2d 147, 149 (1967).

"[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . This same reasoning has been applied where the change was constitutional, statutory, or judicial." 393 U.S. 268, 281-282 (1969). The Fourth Circuit did not argue that this case involves any of the acknowledged exceptions to the rule in *Thorpe*. See 393 U.S. 268, 282. The decision of the Fourth Circuit announced in this case and *Thompson*, limiting section 718 to legal services rendered after June 30, 1972, is plainly inconsistent with this Court's decision in *Thorpe* and must be reversed. See also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 418-420 (1971).

The Fourth Circuit further grounded its refusal to apply § 718 to this case on the fact that no final order regarding the merits of this case was pending on appeal on June 30, 1972. The reason why the Court of Appeals thought this fact significant is unclear. Judge Winter, dissenting, reads the majority as holding that legal fees can only be awarded under § 718 if that award is made simultaneous with the decision on the merits. Pp. 75a-77a.²⁸ Such a rule makes no sense whatever, and can only serve to frustrate the congressional purposes behind the new statute. See p. 76a. It is possible, alternatively, that the Fourth Circuit was announcing a new rule on retroactivity, requiring not only the question of legal fees but also the merits of the desegregation litigation to be pending on appeal when the new statute was enacted. Plaintiffs conceive of no warrant for such a rule. *Thorpe* clearly requires that new laws be applied to pending controversies regardless of whether other controversies between the same parties have been finally decided.

²⁸ In fact the question of legal fees was pending before the District Court when the plan of April 5, 1971, was approved.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

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APPENDIX



**Memorandum Opinion of District Court
in *Bradley* Action**

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION
CIVIL ACTION No. 3353-R

CAROLYN BRADLEY, etc., *et al.*,

v.

THE SCHOOL BOARD OF THE
CITY OF RICHMOND, VIRGINIA, *et al.*

This class action, brought ten years ago in an effort to end racial discrimination in the operation of public schools in Richmond, Virginia, is before the Court on a motion for attorneys' fees. An appropriate ruling on the pending motion requires an abridged review of events since March of 1970.

On March 10, 1970, a motion for further relief was filed in this case, and after extensive hearings this Court ordered into effect an interim desegregation plan prepared by the School Board for the school year 1970-71, *Bradley v. School Board of City of Richmond*, 317 F. Supp. 555 (E.D. Va. 1970), and later; a plan for 1971-72, *Id.*, 325 F. Supp. 828 (E.D. Va. April 5, 1971). Appended to the motion for further relief was an application for an award of reasonable attorneys' fees, to be paid by the City School Board. In light of the defendants' conduct before and dur-

*Memorandum Opinion of District Court
in Bradley Action*

ing litigation, and by reason of the unique character of school desegregation suits, justice requires that fees should be awarded.

This case lay dormant from 1966 until the motion of March, 1970. During that period the city schools were operated under a free choice system of pupil assignment. The plan was approved by the court of appeals, *Bradley v. School Board of City of Richmond*, 315 F.2d 310 (4th Cir. 1965), but the case was remanded for further hearings on faculty assignments by the Supreme Court, *Bradley v. School Board of the City of Richmond*, 382 U.S. 103 (1965). After some further district court proceedings the case lay idle until 1970.

When the suit was reactivated the defendants were directed, pursuant to this Court's usual practice in school desegregation cases, to state on the record whether they contended that the schools were then operating as a unitary system, and, if not, what period of time would be required to formulate a constitutional plan. In open court, albeit reluctantly, the defendants admitted that the Constitution was not being complied with;¹ they were ordered on April 1, 1970, to submit a unitary plan on or before May 11, 1970. Hearings were set for June, and the parties were admon-

¹ Of course, it scarcely excuses the School Board's continued operation under an invalid plan that they were under an outstanding court order to do so. Legal requirements change; what is consistent, moreover, with a pace of deliberate speed at one time should not be confused with the ultimate goal. The school system was in violation of outstanding authoritative decisions, *Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 138, 141 (4th Cir. 1970), rev'd. in part, 402 U.S. 1 (April 20, 1971). To await the plaintiffs' initiation of legal action may have seemed a wise strategic choice, but it cannot be equated with the fulfillment of the affirmative duty to desegregate.

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ished as to the necessity of implementing a unitary plan in the fall of 1970.

The Court will not restate its findings of fact and conclusions of law which resulted from the hearings of the summer of 1970; these are adequately covered in the reported decision. A few points relevant to the present motion should be stressed.

Although the School Board had stated, as noted, that the free choice system failed to comply with the Constitution, producing as it did segregated schools, they declined to admit during the June hearings that this segregation was attributable to the force of law (transcript, hearing of June 20, 1970, at 322). Hearings which the Court had hoped would be confined to the effectiveness of a plan of desegregation consequently were expanded; the plaintiffs were put to the time and expense of demonstrating that governmental action lay behind the segregated school attendance prevailing in Richmond. Public and private discrimination were shown to lie behind the residential segregation patterns over which the School Board proposed to draw neighborhood school zone lines. Evidence on choice of school and public housing sites, restrictive covenants in deeds, discrimination in federal mortgage insurance opportunities, housing segregation ordinances, and continued practice of private discrimination was presented, most of it without cross-examination or serious attempt at refutation. All of this proof was clearly relevant, not only under *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 431 F.2d at 141, decided just prior to the hearings, but also under *Brewer v. School Board of City of Norfolk*, 397 F.2d 37, 41 (4th Cir. 1968).

At the same hearings the School Board presented a desegregation proposal developed by a team from the Depart-

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ment of Health, Education and Welfare that was obviously unacceptable under law then current. It is hard to see how the Board could have contended otherwise, for its proposals achieved very little desegregation beyond what prevailed under the free choice system, which it had rightly declined to defend. These hearings were held more than two years after *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) was handed down. Since that time it has been clear that compliance with the Constitution is not measured by the formal racial neutrality of a pupil assignment plan but rather by its effectiveness in extinguishing the public policy of segregation. Freedom of choice had left three of seven high schools all black and one nearly all white. It left five junior high schools out of eleven all black or nearly so and two nearly all white. Of forty-four elementary schools, twenty-two were substantially all black and eight almost all white, with several others containing a significant but still grossly disproportionate Negro enrollment. The School Board's desegregation proposal—the HEW plan—would have placed small minorities of the opposite race in the three formerly black high schools and would have left the white high school unchanged. Three junior high schools would have remained as obviously black facilities and there would have been two clearly white; and five almost 100% white and fifteen nearly all black elementary schools. Many other elementary schools could not strictly have been called all black or all white, but departed substantially from the systemwide ratio and would be readily identifiable racially.²

² A full tabulation of the results projected under the HEW plan is given in *Bradley v. School Board of the City of Richmond*, *supra*, 317 F. Supp. at 564-65.

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Not only did the results of the School Board proposal condemn it, but also it failed to pass legal muster because those who prepared it were limited in their efforts further to desegregate by self-imposed restrictions on available techniques. Consideration of residential segregation in drawing zone lines was omitted, except that it was decided at a late date to pair a few schools; transportation was not seriously considered as a desegregation tool, and in general, astonishingly, race was not taken into account in the formulation of the plan. Since 1966 it has been plain that school boards in this circuit may consider race in preparing zone plans. *Wanner v. County School Board of Arlington County*, 357 F.2d 452 (4th Cir. 1966). To bar this key factor from discussion would render impossible almost the first step in the Board's task of disestablishing the dual system. For failure to address itself to the legal duty imposed upon it by *Green*, that of taking affirmative action to desegregate, the plan was manifestly invalid. Furthermore, *Swann* held that busing and satellite zoning were legitimate integration techniques. *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 431 F.2d at 145-46. A plan that failed even to experiment with these legitimate tools and yet left such substantial segregation should never have been proposed to the Court.

The School Board was directed to submit a further plan within a month's time, and hearings were held on the second proposal. At the conclusion of the June proceeding the Court had specifically called the parties' attention to recent appellate rulings fixing the extent of their obligation: *Brewer v. School Board of City of Norfolk*, 434 F.2d 408 (4th Cir.) *cert. denied* 399 U.S. 929 (1970); *Green v. School Board of City of Roanoke*, 428 F.2d 811 (4th Cir. 1970);

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United States v. School Board of Franklin City, 428 F.2d 373 (4th Cir. 1970); *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 431 F.2d. Under these precedents the School Board's second plan also failed to establish a unitary school system. Its deficiencies are fully treated in the Court's earlier opinion;³ the most glaring inadequacy is the large proportion of elementary students placed in substantially segregated schools. The Fourth Circuit in *Swann* rejected an elementary plan which left over half the black elementary students in 86% to 100% black schools and about half the whites in 86% to 100% white schools. In the face of that ruling the School Board proposed a plan under which 8,814 of 14,943 black elementary pupils would be in twelve elementary schools over 90% black, and 4,621 of 10,296 white elementary pupils would attend seven 90% or more white schools. At the same time, although testimony in the June hearings by school administrators indicated a consensus that desegregation of such schools could not be achieved without transporting students, the School Board had in August still taken no steps to acquire the necessary equipment. Because by that time it was too late to do so by the beginning of the 1970-71 school year, the plaintiffs were forced to accept only partial relief in the form of the School Board's inadequate plan on an interim basis.

The order approving that plan included a direction to the defendants to report to the Court by mid-November the specific steps taken to create a unitary system and to advise the Court of the earliest date such a system could be put into effect.

³ *Bradley v. School Board of the City of Richmond*, *supra*, 317 F. Supp. at 572-76.

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Appeals were noted by all parties, but efforts by the City Council to secure a stay, pursued at all levels, failed. On motion of the School Board, however, briefing was postponed by the Court of Appeals pending rulings by the Supreme Court on school desegregation cases then before that court. The effect of that order was to stay all appellate proceedings.

The School Board's November report stated only that three further desegregation plans were in preparation and would be submitted on January 15, 1971. These proposals were to be based on various assumptions concerning the Supreme Court's disposition of the cases before it.

In the meantime the School Board sought relief from the Court's outstanding order enjoining planned school construction. Depositions of expert witnesses were taken and the matter was submitted on briefs. The evidence disclosed that the School Board had not seriously reviewed the site and capacity decisions which it had made, according to earlier testimony, without consideration of their impact on efforts to desegregate. Rather it was reportedly determined that the sites chosen were compatible with various conceivable measures of the affirmative duty to desegregate, none of which was consistent with current decisions. Bases for the conclusions of compatibility, moreover, were not presented. The Court declined to lift the construction injunction. *Bradley v. School Board of City of Richmond*, — F. Supp. — (E.D. Va. Jan. 29, 1971).

In December, prior to consideration of the school construction issue, the plaintiffs moved for further relief effective during the second semester of the 1970-71 school year, stating that the defendants' report indicated that they did not intend further desegregation efforts during

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the current year. The promised plans were filed in January.⁴ The only proposal which promised more than an insubstantial advance over the inadequate interim plan, the School Board's Plan 3, required the purchase of transportation facilities which the School Board still would only say it would acquire if so ordered. In its November report the Board stated firmly its opposition to any mid-year modifications of the plan.

The Court declined to order further mid-year relief, *Bradley v. School Board of City of Richmond*, — F. Supp. — (E.D. Va., Jan. 29, 1971). Because of the nearly universal silence at appellate levels, which the Court interpreted as reflecting its own hope that authoritative Supreme Court rulings concerning the desegregation of schools in major metropolitan systems might bear on the extent of the defendants' duty, the Court felt that it would not be reasonable to require further steps to desegregate during the second semester, and particularly so in view of the expense of such steps and the likelihood that they could not become effective, on account of the delay in acquiring transportation facilities, until late in that semester. The fact remains, nonetheless, that the School Board had made effective and immediate further relief nearly impossible because it had not taken the specific step of seeking to acquire buses. This policy of inaction, until faced with a court order, is especially puzzling in view of representations later made by counsel for the School Board to the effect that at least fifty-six bus units would have to be bought, in the Board's view, in order to operate under

⁴ They are described in this Court's prior opinion, *Bradley v. School Board of City of Richmond*, 325 F. Supp. 828 (E.D. Va., Apr. 5, 1971).

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nearly any possible plan during the 1971-72 school year.

Finally, the Court heard further evidence on the plan to be implemented during 1971-72.⁵ The School Board, as noted, offered three plans;⁶ one only, as stated, would work to eliminate the substantial segregation that remained in Richmond schools. Plan 1 was a strictly contiguous geographic zoning system. Plan 2, at the elementary level, suffered from the same faults which had condemned the school administration's plan in *Swann* and the interim plan in this case. Plan 3 substantially eliminated the racial identifiability of numerous elementary facilities. But, although the Board prepared that plan, they did not urge its adoption but instead endorsed plan 2 for the 1971-72 school year. At the hearings, counsel for the School Board again stated that no further transportation units would be acquired unless the Court so ordered specifically, despite that the Court had found in August of 1970 that the interim plan did not achieve a sufficient level of desegregation and could be approved as a temporary expedient only in view of the lack of equipment necessary for further desegregation. The Court directed the adoption of plan 3 for the upcoming school year.

As a very general statement of the law, it is true that American courts do not reimburse the victorious litigant for the full price of his victory, his attorney's fees and expenses. See Goodhart, *Costs*, 38 Yale L.J. 849 (1929). Like most generalizations in law, this rule is subject to

⁵ The instant motion seeks only fees and expenses for litigation to January 29, 1971, but evidence of subsequent behavior of the defendants is relevant in that it tends to show a consistent policy, pursued at all stages of the case.

⁶ Details of the proposals are given in *Bradley v. School Board of City of Richmond*, 325 F. Supp. 828 (E.D. Va., April 5, 1971).

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several exceptions. The shape of these exceptions provides an example of the tensions existent in our system between two sources of legal rules: courts and legislatures. For the cases show that courts recognize a power in themselves, necessary at times in order fully to achieve justice, to direct that a losing litigant pay his opponent's attorney's fees. This power, if it has a statutory source at all, is conferred implicitly in the grant of equitable jurisdiction. At the same time legislative directives sometimes provide that a court may or must award a winning plaintiff reasonable counsel fees. Such statutes, not infrequently, form part of a more extensive legislative scheme which creates a legal right and the appropriate remedy for its violation. It is not difficult to see how legal doubts may arise as to the court's power in a certain case to direct the payment of fees. Most federal cases involve the vindication of statutory rights. In certain cases the question arises whether Congress, in omitting from legislation any provision for the award of counsel fees, intended to impose a restriction on available relief or intended instead to permit the courts to exercise the power resting in them under existing decisions. Conversely, where a fee award is specifically authorized, the question arises whether some different factual showing from that required under general equitable principles supports an award.

The plaintiffs do not argue that explicit statutory authorization exists for an award of counsel fees. The case is brought pursuant to 42 U.S.C. § 1983 and this Court's general equitable power to enforce constitutional protections; Congress has not mandated that judgments on such cases should as a matter of ordinary course include the payment of counsel fees. *Williams v. Kimbrough*, 415 F.2d 874 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

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The case therefore presents an issue to be resolved on the basis of principles governing this Court's general equitable discretion, if discretionary power is available to the Court in matters of this nature. In seeking out whatever particular or special circumstances justify an award of attorney's fees, the Court must be mindful that this case should be compared not solely with other cases concerning school desegregation, but with all other types of litigation as well.

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939), establishes that counsel fees and other litigation expenses, not taxable as costs by statute, may be awarded as part of a litigant's relief. "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts," *id.*, 164. One circumstance in which an award may be an appropriate use of the power of equity is that in which an individual litigant by his activities creates or preserves a fund in which others than he may have an interest.⁷ *Sprague* was such a case, in effect, but the Court in that decision declined to limit the equity court's power to any particular circumstances. "As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice," *Id.*, 167.

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), stresses that the principles allowing awards of counsel fees have no application in cases involv-

⁷ See, e.g., *Trustees v. Greenough*, 105 U.S. 527 (1881); *Kahan v. Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 348 U.S. 950 (1970); *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965); *Mercantile-Commerce Bank v. Southeast Arkansas Levee District*, 106 F.2d 966 (8th Cir. 1939).

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ing "statutory causes of action for which the legislature had prescribed intricate remedies," *Id.*, 719, not intended by Congress to include the payment of counsel fees. *Fleischmann* has, however, been followed by *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). In *Newman*, an action under the 1964 Civil Rights Act, 42 U.S.C. § 2000a, et seq., an enactment which provides in terms that its remedies are exclusive, 42 U.S.C. § 2000a-6(b), the Court held that a successful plaintiff should be awarded attorney's fees in the ordinary case, under a specific provision of the act. The Court noted, however, that such a sanction could have been imposed upon a defendant who litigated in bad faith for purposes of delay, *Newman v. Piggie Park Enterprises*, *supra*, 402 n. 4, even had Congress not authorized by statute an award of counsel fees.

In *Mills* the Court directed that a corporation reimburse plaintiffs in a derivative suit for their attorney's fees, despite that the statute involved made specific provision for attorney's fees only in sections other than that on which liability was predicated in the action. Congress' failure to establish precise bounds of possible relief for violation of its prohibitions (indeed the private right of action is implied) was thought to reflect an intention not to exclude the possibility of an award of attorney's fees under conventional principles. *Mills v. Electric Auto-Lite Co.*, *supra*, 391. The Court directed an interim award on a variation of the fund theory.

Lower courts have also construed federal enactments, old and recent, not to bar an award of attorney's fees when equity would require it, in the absence of indicia of congressional purpose to render such relief unavailable. See

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Lee v. Southern Home Sites Corp., 429 F.2d 290. (5th Cir. 1970) (42 U.S.C. § 1982); *Kahan v. Rosentiel*, *supra*, (Securities Exchange Act § 10b, Rule 10b-5); *Local 149, International Union, Automobile, Aircraft and Agricultural Implement Manufacturers of America v. American Brake Shoe Co.*, 298 F.2d 212 (4th Cir.), *cert. denied*, 369 U.S. 873 (1962) (Labor Management Relations Act § 301).

Section 1983 and general federal equitable power to protect constitutional rights are not restricted by any congressional language indicating an intention to preclude an award of counsel fees, either by express exclusion or the creation of an intricate remedial scheme. The statute creates liability

“in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983.

In its reference to suits in equity the statute must be taken to authorize relief, such as an award of counsel fees, as might normally be available in such suits. Case law prior to *Fleischmann* in school desegregation cases, discussed below, recognizes the power of a federal equity court trying a desegregation suit to award counsel fees. In the light of the decisions subsequent to *Fleischmann*, such construction of § 1983 is not subject to serious question.

The issue, then, is whether this case is a proper one for a discretionary award.

Many of the cases directing or approving an award of attorney's fees turn upon the fund theory: the concept that, first, a litigant's counsel fees have been expended in such a manner as to benefit a number of other persons, not participating in the suit, and that, second, means are avail-

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able whereby such outside beneficiaries can be made to bear something like a pro rata share of expenses by taking the fee from a defendant (a fiduciary, often) who holds or controls something in which the beneficiaries have an interest. School desegregation cases, or any suits against governmental bodies, do not fit this fund model without considerable cutting and trimming. This is a class suit to be sure, with class relief, but to say that the plaintiff class will actually in effect pay their attorneys if the School Board is made to pay counsel fees entails a number of unproved assumptions about the extent to which pupils pay for their free public schooling.

Nonetheless, the fund theory does not exhaust the grounds on which an equity decree to pay counsel fees may be based. Other cases exist in which "overriding considerations indicate the need for such recovery." *Mills v. Electric Auto-Lite Co.*, *supra*, 391-92; see Note, 77 Harvard L.Rev. 1135 (1964). Such considerations in general are present when a party has used the litigation process for ends other than the legitimate resolution of actual legal disputes.

In *Guardian Trust Co. v. Kansas City Southern Railway Co.*, 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930), the Eighth Circuit reviewed exhaustively the circumstances in which an equity court might allow costs "as between solicitor and client" despite the lack of statutory authority. That court concluded that such a fee award was proper in a number of instances, including those in which a fiduciary has defended his trust, or a party has defended his title to certain property against baseless and vexatious litigation, or a defendant, charged with gross misconduct, has prevailed on the merits.

In *Rude v. Buchalter*, 286 U.S. 451 (1932), the Supreme Court held unwarranted an award of attorney's fees against

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which was required, as a bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employing of counsel to institute and carry on extensive and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situations, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. *Id.*, 481.

Although the indication that such costs are proper if "essential to the doing of justice" in a sense begs the question, the factors mentioned give some guidance. The suit obviously benefited an entire class of Negro locomotive firemen. The defendant, equipped with legislatively-conferred bargaining powers, owed them something akin to a fiduciary's concern and had violated that duty. The resources of the parties were disproportionate. The cost of litigation was disproportionate to the monetary benefit to any one plaintiff. Last, the legal issues were relatively settled before suit. Analogous factors are present in the instant litigation.

In *Taussig v. Wellington Fund, Inc.*, 187 F. Supp. 179 (D. Del. 1960) *aff'd*, 313 F.2d 472 (3d Cir. 1963), *cert. denied*, 374 U.S. 806 (1963), a stockholders derivative suit charging unfair competition, the shareholder plaintiffs were awarded attorneys' fees not out of the treasury of their corporation, which their lawsuit presumably benefited, but against those guilty of unfair practices. Such an equitable damage award, the court said, must be premised on a finding that "the wrongdoers' actions were unconscion-

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able, fraudulent, willful, in bad faith, vexatious, or exceptional," *Id.*, 187 F. Supp. at 222 (footnotes omitted).

Our own Circuit ruled that it was within the power of a court of equity to award attorneys' fees in a suit under § 301 of the Taft-Hartley Act to enforce an arbitrator's award if it were shown that the employer's refusal to comply with the award was arbitrary and unjustified. The decision was based on precedents establishing a court's equitable power and on the judicial duty to develop a body of federal law under § 301. In the particular case the litigation was justified, and a fee award improper, because questions of some legal substance remained. *Local 149, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. American Brake Shoe Co.*, *supra*.

In *Vaughan v. Atkinson*, 369 U.S. 527 (1962), attorneys' fees as an item of damages or an admiralty case were held due when the owner's conduct toward an ill seaman was consistently stubborn:

In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. *Id.*, 530-31.

A district court in another case declined to exercise its acknowledged equity power to award attorneys' fees in a suit against a labor union, finding no "fund" had been created and no compelling circumstances otherwise existed. The court commented, however, that:

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[W]ith the possible exception of civil rights litigation, see *Bell v. School Bd.*, 321 F.2d 500 (4th Cir. 1963), 77 Harv. L. Rev. 1135 (1964), no area is more susceptible to the salutary effects of the exercise of the chancellor's power to award counsel fees without the presence of a fund than litigation involving a member and his union. Primarily, this litigation seeks solely equitable relief and traditionally puts an impecunious group of members against a solvent union with little expectation of a substantial monetary award from which to pay a counsel fee, even a contingent one. This recognition has prompted several courts to allow counsel fees to successful union members who through litigation have corrected union abuse even though they have not established a fund or conferred a pecuniary benefit upon the commonwealth of the union. *Cutler v. American Federation of Musicians*, 231 F. Supp. 845 (S.D. N.Y. 1964), *aff'd*, 366 F.2d 779 (2d Cir. 1966), *cert. denied*, 386 U.S. 993 (1967).

A class suit to reapportion a local government unit, *Dyer v. Love*, 307 F. Supp. 974 (N.D. Miss. 1969), was the context for an award of counsel fees in a civil rights case. When the defendants, members of a board of supervisors, declined to reapportion their constituents, despite gross population variations between districts, and instead forced citizens to initiate "vigorously opposed" litigation, the court found this "unreasonable and obstinate" conduct to be fair basis for a fee allowance, even though there had been no Supreme Court holding during most of the suit's pendency explicitly defining the defendants' duty, *Id.*, 987. The direction of the developing law, the court said, should have

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been clear. Additionally, the court held that the absence of any fee agreement between plaintiffs and their lawyer constituted no bar to an award, because it was within the court's power to order payment to the attorneys themselves.

In another case out of the same court, an allowance of counsel fees was denied when the losing defendants, public educational administrators, were found not to have presented their defenses "in bad faith or for oppressive reasons," *Stacy v. Williams*, 50 F.R.D. 52 (N.D. Miss. 1970).

In *Lee v. Southern Home Sites Corp.*, *supra*, the Fifth Circuit authorized attorneys' fee awards in a suit under 42 U.S.C. § 1982 contesting racial discrimination in housing sales, relying on the directive in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), to fashion appropriate and effective equitable remedies for § 1982 violations. The discretionary power clearly exists, the court said, and its exercise is especially appropriate in civil rights cases, where often discrimination with wide public impact can be terminated only by private lawsuit and problems of securing legal representation have been recognized. However, because the district court's exercise of its discretion could only be reviewed on the basis of factfindings on the relevant issues, the case was remanded for further proceedings.

Numerous other cases support the power of a court of equity to allow counsel fees when a litigant's conduct has been vexatious or groundless, or he has been guilty of overreaching conduct or bad faith. See *Siegel v. William E. Bookhultz & Sons*, 419 F.2d 720 (D.C. Cir. 1969); *Smith v. Allegheny Corp.*, 394 F.2d 381 (2d Cir.) *cert. denied*, 393 U.S. 939 (1968); *McClure v. Borne Chemical Co.*, 292 F.2d 824 (3d Cir.) *cert. denied*, 368 U.S. 939 (1961); *In re Carico*, 308 F. Supp. 815 (E.D. Va. 1970); *Stevens v. Abbott, Proctor & Paine*, 288 F. Supp. 836 (E.D. Va. 1968).

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School desegregation decisions illustrate the specific application of a court's equitable discretion to allow counsel fees to plaintiffs when the evidence shows obstinate non-compliance with the law or imposition by defendants on the judicial process for purposes of harassment or delay in affording rights clearly owing. See, e.g. *Nesbit v. Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969); *Williams v. Kimbrough*, *supra*; *Cato v. Parham*, 403 F.2d 12 (8th Cir. 1968); *Rolfe v. County Board of Education of Lincoln County*, 391 F.2d 77 (6th Cir. 1968); *Hill v. Franklin County Board of Education*, 390 F.2d 583 (6th Cir. 1968); *Clark v. Board of Education of Little Rock School District*, 369 F.2d 661 (6th Cir. 1966); *Griffin v. County School Board of Prince Edward County*, 363 F.2d 206 (4th Cir. 1966); *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965); *Bradley v. School Board of City of Richmond*, *supra*, 345 F.2d; *Rogers v. Paul*, 345 F.2d 117 (8th Cir.) *rev'd on other grounds*, 382 U.S. 198 (1965); *Brown v. County School Board of Frederick County*, 327 F.2d 655 (4th Cir. 1964); *Bell v. County School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963); *Pettaway v. County School Board of Surry County*, 230 F. Supp. 480 (E.D. Va.) *rev'd on other grounds*, 339 F.2d 486 (4th Cir. 1964). See also, *Felder v. Harnett County Board of Education*, 409 F.2d 1070 (4th Cir. 1969), concerning Appellate Rule 38 and "frivolous" appeals.

A prior appellate opinion in this case states that district courts should properly exercise their power to allow counsel fees only "when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obstinate obduracy." *Bradley v. School Board of City of Richmond*, *supra*, 345

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F.2d at 321. The Court of Appeals recognized that appellate review of such orders, however, necessarily had a narrow scope and failed to disturb a nominal fee award.

In determining whether this particular lawsuit was unnecessarily precipitated by the School Board's obduracy, the Court cannot "turn the clock back," *Brown v. Board of Education of Topeka*, 347 U.S. 483, 492 (1954), to 1965. The School Board's conduct must be considered with reference to the state of the law in 1970. The Court has already reviewed the course of the litigation. It should be apparent that since 1968 at the latest the School Board was clearly in default of its constitutional duty. When haled into court, moreover, it first admitted its noncompliance, then put into contest the responsibility for persisting segregation. When liability finally was established, it submitted and insisted on litigating the merits of so-called desegregation plans which could not meet announced judicial guidelines. At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order.

Other courts have catalogued the array of tactics used by school authorities in evading their constitutional responsibilities, *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 13 (April 20, 1971) (slip opinion at 9); *Jones v. Alfred H. Mayer Co.*, *supra*, 448 n.5 (1968) (Douglas, J., concurring); *Wright v. Council of the City of Emporia*, No. 14,552, 442 F.2d 570, 593 (4th Cir. 1971) (slip opinion at 13-14) (Sobeloff, J., dissenting). The freedom of choice plan under which Richmond was operating clearly was one such. When this Court

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filed its opinion of August 17, 1970, confirming the legal invalidity of that plan, the HEW proposal, and the interim plan, it was not propounding new legal doctrine. Because the relevant legal standards were clear it is not unfair to say that the litigation was unnecessary. It achieved, however, substantial delay in the full desegregation of city schools. Courts are not meant to be the conventional means by which persons' rights are afforded. The law favors settlement and voluntary compliance with the law. When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes.

It is not argument to the contrary that political realities may compel school administrators to insist on integration by judicial decree and that this is the ordinary, usual means of achieving compliance with constitutional desegregation standards. If such considerations lead parties to mount defenses without hope of success, the judicial process is nonetheless imposed upon and the plaintiffs are callously put to unreasonable and unnecessary expense.

As long ago as 1966 a court of appeals in another circuit uttered a strong suggestion that evasion and obstruction of desegregation should be discouraged by compelling state officials to bear the cost of relief:

The Board is under an immediate and absolute constitutional duty to afford non-racially operated school programs, and it has been given judicial and executive guidelines for the performance of that duty. If well-known constitutional guarantees continue to be ignored or abridged and individual pupils are forced to resort

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to the courts for protection, the time is fast approaching when the additional sanction of substantial attorneys' fees should be seriously considered by the trial courts. Almost solely because of the obstinate, adamant, and open resistance to the law, the educational system of Little Rock has been embroiled in a decade of costly litigation, while constitutionally guaranteed and protected rights were collectively and individually violated. The time is coming to an end when recalcitrant state officials can force unwilling victims of illegal discrimination to bear the constant and crushing expense of enforcing their constitutionally accorded rights. *Clark v. Board of Education of Little Rock School District, supra*, 671.

That time has now expired. See also, *Cato v. Parham, supra*. Our Court of Appeals, too, has indicated a willingness to place litigation costs on defendants in recent cases; in *Nesbit v. Statesville City Board of Education, supra*, they took the unusual step of directing the district court to exercise its discretion in the matter in favor of the plaintiffs. This was also done six years before in *Bell v. County School Board of Powhatan County, supra*, when aggravated misconduct was shown; in *Nesbit*, by contrast, the defendants seem to have been guilty of delay alone.

Not only has the continued litigation herein been precipitated by the defendants' reluctance to accept clear legal direction, but other compelling circumstances make an equitable allowance necessary. This has been a long and complex set of hearings. Plaintiffs' counsel have demonstrated admirable expertise, discussed below, but from the beginning the resources of opposing parties have been dis-

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proportionate. Ranged against the plaintiffs have been the legal staff of the City Attorney's office and retained counsel highly experienced in trial work. Additionally the School Board possessed the assistance of its entire administrative staff for investigation and analysis of information, preparation of evidence, and expert testimony of educators. Few litigants—even the wealthiest—come into court with resources at once so formidable and so suited to the litigation task at hand. Sums paid outside counsel alone far exceed the plaintiffs' estimate of the cost of their time and effort.

Moreover, this sort of case is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class (something which must give pause to all attorneys, sensitive as is the profession to its ethical responsibilities) necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes. Coupled with the cost of proof is the likely personal and professional cost to counsel who work to vindicate minority rights in an atmosphere of resistance or outright hostility to their efforts. See *NAACP v. Button*, 371 U.S. 415, 435-36 (1963); *Sanders v. Russell*, 401 F. 2d 241 (5th Cir. 1968).

Still further, the Court must note that the defendants' delay and inaction constituted more than a cause for needless litigation. It inspired in a community conditioned to segregated schools a false hope that constitutional interpretations as enunciated by the courts pursuant to their responsibilities, as intended by the Constitution, could in

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some manner, other than as contemplated by that very document, be influenced by the sentiment of a community.

The foregoing in no manner is intended to express a lack of personal compassion for the difficult and arduous task imposed upon the members of the defendant school board. Nevtherless they, and indeed the other defendants as well, had a public trust to encourage what may well be considered one of the most precious resources of a community; an attitude of prompt adherence to the law, regardless of the manifested erroneous view that mere opposition to constitutional requirements would in some manner result in a change in those requirements.

Power over public education carries with it the duty to provide that education in a constitutional manner, a duty in which the defendants failed.

These general factors were present, although in lesser magnitude, in the *Rolax* case in 1951, in which the Fourth Circuit said that an award of counsel fees would be fully justified.

Passing the question of the appropriateness of allowing fees on the basis of traditional equitable standards, the Court is persuaded that in 1970 and 1971 the character of school desegregation litigation has become such that full and appropriate relief must include the award of expenses of litigation. This is an alternative ground for today's ruling.

The circumstances which persuaded Congress to authorize the payment of attorney's fees by statute under certain sections of the 1964 Civil Rights Act, see 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), very often are present in even greater degree in school desegregation litigation. In *Newman v.*

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Piggie Park Enterprises, Inc., supra, the Supreme Court elucidated the logic underlying the 1964 legislation:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. *Id.*, 401-02.

Newman was followed in *Miller v. Amusement Enterprises, Inc.*, 426 F. 2d 534 (5th Cir. 1970), in which the court recognized that in cases where the plaintiffs had undertaken no obligation to pay counsel, congressional purposes would best be served by directing payment to the lawyers.

The rationale of *Newman*, moreover, has equal force in employment discrimination cases, even where plaintiffs are only partially successful, where their lawsuit serves to bring an employer into compliance with the Act. *Lea v. Cone Mills Corp.*, No. 14,068, 438 F. 2d 80 (4th Cir. Jan. 29, 1971); *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421 (5th Cir. 1970).

School desegregation cases almost universally proceed as class actions. Use of this unconventional form of action

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converts a private lawsuit into something like an administrative hearing on compliance of a crucial public facility with legal rules defining, in part, its mission. Such result has come about as the law developed so that it protects as a matter of individual right not just admission into formerly white schools of black applicants, but attendance in a nondiscriminatory school system. *Green v. County School Board of New Kent County, supra*; *Bradley v. School Board of City of Richmond*, 317 F. 2d 429 (4th Cir. 1963).

Manifestly, too, not only are the rights of many asserted in such suits, but also it has become a matter of vital governmental policy not just that such rights be protected, but that they be immediately vindicated in fact. See 42 U.S.C. § 2000e, et seq. Partly this national goal has been pursued by administrative proceedings, but a large part of the job has fallen to the courts, and for them it has been a task of unaccustomed extent and difficulty. "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then." *Swann v. Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. 1, 13.

The private lawyer in such a case most accurately may be described as "a private attorney general." Whatever the conduct of defendants may have been, it is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy of nondiscrimination as to a large proportion of citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof. The fulfillment of constitutional guaranties, when to do so profoundly alters a key

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social institution and causes reverberations of untraceable extent throughout the community, is not a private matter. Indeed it may be argued that it is a task which might better be undertaken in some framework other than the adversary system. Courts adapt, however; but in doing so they must recognize the new legal vehicles they create and ensure that justice is accomplished fully as effectively as under the old ones. The tools are available. Under the Civil Rights Act courts are required fully to remedy an established wrong, *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 232-34 (1964), and the payment of fees and expenses in class actions like this one is a necessary ingredient of such a remedy.

This rule is consistent with the Court's power and serves an evident public policy to encourage the just and efficient disposition of cases concerning school desegregation. Cf. 42 U.S.C. § 2000c-6. It serves no person's interest to decide these cases on the basis of a haphazard presentation of evidence, hampered by inadequate manpower for research into the bases of liability and the elements of relief. Where the interests of so many are at stake, justice demands that the plaintiffs' attorneys be equipped to inform the court of the consequences of available choices; this can only be done if the availability of funds for representation is not left to chance. In this unprecedented form of public proceeding, exercise of equity power requires the Court to allow counsel's fees and expenses, in a field in which Congress has authorized broad equitable remedies "unless special circumstances would render such an award unjust," *Newman v. Piggie Park Enterprises, Inc.*, *supra*, 402. No such circumstances are present here.

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The amount of the allowance is not difficult to establish. Counsel have agreed to submit the matter of costs, fees and expenses to the Court on documentary evidence. The period of time to which this opinion relates runs from the March, 1970, motion for further relief until January 29, 1971. Findings of fact as to defendants' actions after that date have been made; these tend to establish their continuing pattern of inaction and resistance.

Trial counsel for the plaintiffs demonstrated throughout the litigation a grasp of the material facts and a command of the relevant law equaled by very few lawyers who have appeared before this Court. Needless to say their understanding of the field enabled them to be of substantial assistance to the Court, which is their duty. Local counsel did not examine witnesses, but assisted in pretrial preparation and also at hearings, as required by local rules. Some of the working hours included in counsel's estimates of time spent, moreover, include travel times. These are properly listed for two reasons. First, counsel can and do work while traveling. Second, other complex cases often require parties to enlist the aid of out-of-town counsel, for whose travel time they pay.

In conformity with practice in his home bar of Memphis, Tennessee, a lawyer for the plaintiffs secured three affidavits from disinterested brother counsel stating their estimate of the fair value of legal services rendered by plaintiffs' counsel. The affidavits state facts showing a current familiarity with prevailing fee rates and with, in two cases, the full case file. Considering the abilities of counsel, the time required, and the results achieved, these lawyers placed a value on the services very close to the estimates of the plaintiffs.

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The Virginia Supreme Court of Appeals long ago set forth the factors relevant to the value of an attorney's services:

[c]ircumstances to be considered . . . are the amount and character of the services rendered, the responsibility imposed; the labor, time and trouble involved; the character and importance of the matter in which the services are rendered; the amount of money or the value of the property to be affected; the professional skill and experience called for; the character and standing in their profession of the attorneys; and whether or not the fee is absolute or contingent . . . The result secured by the services of the attorney may likewise be considered; but merely as bearing upon the consideration of the efficiency with which they were rendered, and in that way, upon their value on a quantum meruit, not from the standpoint of their value to the client. *Campbell County v. Howard*, 133 Va. 19, 112 S.E. 2d 876, 885 (1922).

In this case the marshalling of evidence on liability and especially on remedy were complex tasks. The responsibility was probably as great as ever falls upon a private lawyer. Time spent was considerable; the Court accepts the estimates of time and expenses dated January 6, 1970, as modified in a memorandum submitted on March 15, 1970. The subject of the litigation was of the utmost importance. The Court has already referred to the lawyers' performance, which they undertook without assurance of reasonable compensation. Substantial results, too, were secured by their efforts.

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On the basis of these factors, plus the equitable considerations compelling an allowance, the Court has determined that a reasonable attorney's fee would be \$43,355.00.⁸

Expense incurred, including taxable costs, have also been estimated by the plaintiffs. As in the case of attorney's fees, these cover the period from March of 1970 through January 29, 1971, and relief is not requested with reference to matters raised by the motion for joinder of further parties filed by the School Board. Costs and expenses as to those matters are therefore not under consideration.

Because the Court has decided that plaintiffs' counsel are due an allowance of the actual expenses of the litigation, it is not necessary to determine whether certain items of expense would in the usual case be taxable as costs under 28 U.S.C. § 1920; see 6 Moore's Federal Practice ¶ 54.70, et seq. (2d ed. 1966).

Many of the expenses incurred by plaintiffs' counsel are attributable to their traveling from New York and Memphis for preparation and trial, but, as the Court already said, the complexity of cases of this sort often, as here, justifies the use of counsel from outside the local bar. The difficulty of retaining local trial counsel must be especially great in litigation over minorities' civil rights; the unpopularity of the causes and the likelihood of small reward discourage many lawyers even from mastering the field of law, much less accepting the cases. Expenses for travel, hotel accommodations and restaurant meals are fairly allowable. The Court takes notice of the fact that

⁸ The Court has reduced the requested allowance pursuant to the supplemental memorandum filed by plaintiffs under date of Mar. 15, 1971, and in addition has deducted the item of \$990 having to do with City Council's requested stay of Court's order of August 1970.

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the absence of an attorney from the area of his office usually results in financial hardship in relation to the balance of his practice, and there ought not to be superimposed thereon additional living expenses.

Fees for expert witness' testimony likewise will be allowed as an expense of suit. It is difficult to imagine a more necessary item of proof (and source of assistance to the Court) than the considered opinion of an educational expert.

Investigation assistance and office supplies likewise are obviously proper; one must contrast the rather minimal expenses of the plaintiffs under this heading with the resources used by the defendants.

Transcript costs, including those for depositions which were taken with the Court's encouragement, and miscellaneous court fees are allowable.

The Court will not assess against the School Board, however, expenses occasioned by the stay applications unsuccessfully filed by the Richmond City Council. These may be considered on a separate application.

The Court computes the total allowable expenses to be \$13,064.65. The total award, including counsel fees, comes to \$56,419.65.⁹ This is a large amount, but it falls well below the value of efforts made in defending the suit. Outside counsel for the School Board to date have submitted bills well in excess of the amounts awarded. [Portions of the submitted bills cover periods with which we are not here concerned.] In addition, as noted above, the defendants made use of the regular legal staff of the City

⁹ Expenses incurred in reference to City Council's request for stay of August 1970 order are not included herein, nor are expenses allocated to filing of amended complaint.

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Attorney and the School Board's administrative staff. For purposes of comparison, in a recent antitrust case tried by one Richmond attorney and two lawyers from outside the local bar, this Court awarded \$117,000 in counsel fees. The amount in this case is not excessive.

For the reasons stated, an order shall enter this day decreeing the payment of the sum mentioned to counsel for the plaintiffs.

ROBERT R. MERHIGE
United States District Judge

Date: May 26, 1971

**Opinion of United States Court of Appeals
in *Bradley* Action**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 71-1774

CAROLYN BRADLEY, etc., *et al.*,

Appellees,

—versus—

THE SCHOOL BOARD OF
THE CITY OF RICHMOND, VIRGINIA, *et al.*,

Appellant.

Section III of the opinion, dealing with the application of Section 718 to the proceedings, heard October 2, 1972, Before HAYNSWORTH, Chief Judge, WINTER, CRAVEN, RUSSELL and FIELD, Circuit Judges (Butzner, Circuit Judge, being disqualified) sitting en banc;

Other parts of the cause heard March 7, 1972,

Before WINTER, CRAVEN and RUSSELL, Circuit Judges.

Decided November 29, 1972.

RUSSELL, Circuit Judge:

This appeal challenges an award of attorney's fees made to counsel for plaintiffs in the school desegregation suit filed against the School Board of the City of Richmond, Virginia. Though the action has been pending for a num-

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ber of years,¹ the award covers services only for a period from March, 1970, to January 29, 1971. It is predicated on two grounds: (1) that the actions taken and defenses entered by the defendant School Board during such period represented unreasonable and obdurate refusal to implement clear constitutional standards; and (2) apart from any consideration of obduracy on the part of the defendant School Board since 1970, it is appropriate in school desegregation cases, for policy reasons, to allow counsel for the private parties attorneys' fees as an item of costs. The defendant School Board contends that neither ground sustains the award. We agree.

We shall consider the two grounds separately.

I.

This Court has repeatedly declared that only in "the extraordinary case" where it has been "found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy" or persistent defiance of law", would a court, in the exercise of its equitable powers, award attorney's fees in school desegregation cases. *Brewer v. School Board of City of Norfolk, Virginia* (4th Cir. 1972), 456 F.2d 943, 949. Whether the conduct of the School Board constitutes "obdurate obstinacy" in a particular case is ordinarily committed to the discretion of the District Judge, to be disturbed only "in the face of compelling circumstances", *Bradley v. School Board of City of Richmond, Virginia* (4th Cir. 1965), 345 F.2d 310, 321. A finding of obduracy

¹ See Note 1 in majority opinion of *Bradley v. The School Board of the City of Richmond, Virginia*, decided June 5, 1972, for history of this litigation.

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by the District Court, like any other finding of fact made by it, should be reversed, however, if "the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.* (1948), 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; Wright-Miller, *Federal Practice and Procedure*, Vol. 9, p. 731 (1971). We are convinced that the finding by the District Court of "obdurate obstinacy" on the part of the defendant School Board in this case was error.

Fundamental to the District Court's finding of obduracy is its conclusion that the litigation, during the period for which an allowance was made, was unnecessary and only required because of the unreasonable refusal of the defendant School Board to accept in good faith the clear standards already established for developing a plan for a non-racial unitary school system. This follows from the pointed statements of the Court in the opinion under review that, "Because the relevant legal standards were clear it is not unfair to say that the litigation (in this period) was unnecessary", and that, "When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes."² At another point in its opinion, the Court uses similar language, declaring that "the continued litigation herein (has) been precipitated by the defendants' reluctance to accept clear legal direction, * * *."³ It would appear,

² See, 53 FRD at p. 39.

³ 53 FRD at p. 40.

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however, that these criticisms of the conduct of the Board, upon which, to such a large extent, the Court's award rests, represent exercises in hindsight rather than appraisal of the Board's action in the light of the law as it then appeared.⁴ The District Court itself recognized that, during this very period when it later found the Board to have been unreasonably dilatory, there was considerable uncertainty with reference to the Board's obligation, so much so that the Court had held in denying plaintiffs' request for mid-school year relief in the fall of 1970, that "it would not be reasonable to require further steps to desegregate * * *," giving as its reason: "Because of the nearly universal silence at appellate levels, which the Court interpreted as reflecting its own hope that authoritative Supreme Court rulings concerning the desegregation of schools in major metropolitan systems might bear on the extent of the defendants' duty."⁵ In fact, in July, 1970, the Court was writing to counsel that, "In spite of the guidelines afforded by our Circuit Court of Appeals and the United States Supreme Court, there are still many practical problems left open, as heretofore stated, including to what extent school districts and zones may or must be altered as a constitutional matter. A study of the cases shows almost limitless facets of study engaged in by the various school authorities throughout the country in attempting to achieve the necessary results."⁶ The District

⁴ See *Monroe v. Board of Com'rs. of City of Jackson, Tenn.* (6th Cir. 1972), 453 F.2d 259, 263:

"In determining whether this Board's conduct was, as found by the District Court, unduly obstinate, we must consider the state of the law as it then existed."

⁵ 53 FRD at p. 33.

⁶ See, Joint Appendix 74-75.

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Court had, also, earlier defended the School Board's request of a stay of an order entered in the proceedings on August 17, 1970, stating: "Their original (the School Board's) requests to the Fourth Circuit that the matter lie in abeyance were undoubtedly based on valid and compelling reasons, and ones which the Court has no doubt were at the time both appropriate and wise, since defendants understandably anticipated a further ruling by the United States Supreme Court in pending cases; * * *." ⁷ Earlier in 1970, too, the Court had taken note of the legal obscurity surrounding what at that time was perhaps the critical issue in the proceeding, centering on the extent of the Board's obligation to implement desegregation with transportation. Quoting from the language of Chief Justice Burger in his concurring opinion in *Norcross v. Board of Education of Memphis, Tenn. City Schools* (1970), 397 U. S. 232, 237, 90 S. Ct. 891, 25 L. Ed. 2d 426, the District Court observed that there are still practical problems to be determined, not the least of which is "to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court."⁸ In fact, the District Court had during this very period voiced its own perplexity, despairingly commenting that "no real hope for the dismantling of dual school systems (in the Richmond School system) appears to be in the offing unless and until there is a dismantling of the all Black residential areas."⁹ At this time, too, as the District Court pointed out, there was some difficulty in applying even the term

⁷ 325 F. Supp. at p. 832.

⁸ 317 F. Supp. at p. 575.

⁹ 317 F. Supp. at p. 566.

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"unitary school system".¹⁰ In summary, it was manifest in 1970, as the District Court had repeatedly stated, that, while *Brown* and other cases had made plain that segregated schools were invalid, and that it was the duty of the School Board to establish a non-racial unitary system, the practical problems involved and the precise standards for establishing such a unitary system, especially for an urbanized school system—which incidentally were the very issues involved in the 1970 proceedings—had been neither resolved nor settled during 1970; in fact, the procedures are still matters of lively controversy.¹¹ It would seem, therefore, manifest that, contrary to the premise on which the District Court proceeded in its opinion, the legal standards to be followed by the Richmond School Board in working out an acceptable plan of desegregation for its system were not clear and plain at any time in 1970 or even 1971.

It is true, as the District Court indicates, that the Supreme Court in 1968 had, in *Green v. County School Board* (1968), 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716, found "freedom-of-choice" plans that were not effective unacceptable instruments of desegregation, and that the defendant Board, following that decision, had taken no affirmative steps on its own to vacate the earlier Court-approved

¹⁰ That this term "unitary" is imprecise, the District Court stated in 325 F. Supp. at p. 844:

"The law establishing what is and what is not a unitary school system lacks the precision which men like to think imbues other fields of law; perhaps much of the public reluctance to accept desegregation rulings is attributable to this indefiniteness."

¹¹ *Bradley v. The School Board of the City of Richmond, Virginia*, decided June 5, 1972, *supra*.

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"freedom-of-choice" plan for the Richmond School system, or to submit a new plan to replace it. In *Green*, the Court had held that, "if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."¹² In suggesting zoning, *Green* offered a ready and easily applied alternative to "freedom-of-choice" for a thinly populated, rural school district such as Old Kent, but other than denying generally legitimacy to freedom-of-choice plans, *Green* set forth few, if any, standards or benchmarks for fashioning a unitary system in an urbanized school district, with a majority black student constituency, such as the Richmond school system. In fact, a commentator has observed that "*Green* raises more questions than it answers."¹³ Perhaps the School Board, despite the obvious difficulties, should have acted promptly after the *Green* decision to prepare a new plan for submission to the Court. Because of the vexing uncertainties that confronted the School Board in framing a new plan of desegregation, problems which, incidentally, the District Court itself finally concluded could only be solved by the drastic and novel remedy of merging independent school districts,¹⁴ and pressed with no local complaints from plaintiffs or others, it was natural that the School Board would delay. Mere inaction under such circumstances, however, and in the face of the "practical difficulties" as reflected in the

¹² 391 U.S. at p. 441.

¹³ 82 *Har. L. Rev.* 116.

¹⁴ A measure found inappropriate by this Court in *Bradley v. The School Board of the City of Richmond, Virginia*, decided June 5, 1972, *supra*.

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later litigation, cannot be fairly characterized as obdurate-ness. Indeed the plaintiffs themselves were in some apparent doubt as to how they wished to proceed in the period immediately after *Green* and took no action until March, 1970. Even then they offered no real plan, contenting themselves with demanding that the School Board formulate a unitary plan, and with requesting an award of attorney's fees. It is unnecessary to pursue this matter, however, since the District Court does not seem to have based its award upon the inaction of the School Board prior to March 10, 1970, but predicated its award on the subsequent conduct of the School Board.

The proceedings, to which this award applies, began with the filing by the plaintiffs of their motion of March 10, 1970, in which they asked the District Court to "require the defendant school board forthwith to put into effect a method of assigning children to public schools and to take other appropriate steps which will promptly and realistically convert the public schools of the City of Richmond into a unitary non-racial system from which all vestiges of racial segregation will have been removed; and that the Court award a reasonable fee to their counsel to be assessed as costs." With the filing of this motion, the Court ordered the defendant School Board to "advise the Court if it is their position that the public schools of the City of Richmond, Virginia are being operated in accordance with the constitutional requirements to operate unitary schools as enunciated by the United States Supreme Court." It added that, should the defendant School Board not contend that its present operations were in compliance, it should "advise the Court the amount of time" needed "to submit a plan." Promptly, within less than a week after the Court issued

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this order, the School Board reported to the Court that (1) it had been advised that it was not operating "unitary schools in accordance with the most recent enunciations of the Supreme Court of the United States" and (2) it had requested HEW, and HEW had agreed, to make a study and recommendations that would "ensure" that the operation of the Richmond Schools was in compliance with the decisions of the Supreme Court. This HEW plan was to be made available "on or about May 1, 1970" and the Board committed itself to submit a proposed plan "not later than May 11, 1970". A few days later, the District Court held a pre-trial hearing and specifically inquired of the School Board as to the necessity for "an evidentiary hearing" on the legality of the plan under which the schools were then operating. The defendant School Board candidly advised the Court that, so far as it was concerned, no hearing was required since it "admitted that their (its) freedom-of-choice plan, although operating in accord with this Court's order of March 30, 1966, was operating in a manner contrary to constitutional requirements."¹⁵ The District Court characterizes this concession by the School Board as "reluctantly" given, and its finding of reluctance at this early stage in the proceeding is an element in the District Court's conclusion that the School Board has been obdurate. The record, however, provides no basis for this characterization of the conduct of the School Board. The School Board had manifested no reluctance to concede that its existing plan of operation did not comply with *Green*. When called on by the Court for a response to plaintiffs' motion, it had acted with becoming dispatch to enlist the assistance of that agency of Government supposed to have expertise in the

¹⁵ 338 F. Supp. 71.

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area of school desegregation and charged by law with the duty of assisting school districts with such problems. Every action of the School Board at this stage could be said to be reasonably calculated to facilitate the progress of the proceedings and to lighten the burdens of the Court. This conclusion is supported by the fact that what the Board did was apparently found acceptable and helpful by both the Court and the plaintiffs. Neither contended that the proposed time-table was dilatory or that the use of HEW was an inappropriate agency to prepare an acceptable plan. As a matter of fact, the utilization of the services of HEW under these circumstances was an approved procedure at the time, one recommended by courts repeatedly to school districts confronted with the same problem as the Richmond schools.¹⁶

On May 4, 1970, HEW submitted to the School Board its desegregation plan, prepared, to quote HEW, in response to the Board's own "expressed desire to achieve the goal of a unitary system of public schools and in accordance with our interpretation of action which will most

¹⁶ *Green v. School Board of City of Roanoke, Virginia* (4th Cir. 1970), 428 F.2d 811, 812; *Monroe v. County Bd. of Education of Madison Co., Tenn.* (6th Cir. 1971), 439 F.2d 804, 806; Note, *The Courts, HEW and Southern School Desegregation*, 77 Yale L. J. 321 (1967).

During oral argument, counsel for the plaintiffs contended that HEW had in recent months become a retarding factor in school desegregation actions, citing *Norcross v. Board of Education of Memphis*, Civ. No. 3931 (W.D. Tenn., Jan. 12, 1972), — F. Supp. —, —. Without passing on the justice of the criticism, it must be borne in mind this was not the view in 1970, as is evident in the decisions cited. This argument emphasizes again, it may be noted, the erroneous idea that the reasonableness of the Board's conduct in 1970 is to be tested, not by circumstances as they were understood then, but in the light of 1972 circumstances.

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soundly achieve this objective." In formulating its plan, HEW received no instructions from the School Board, "Except to try our best to meet the directive of the Court Order and they gave me the Court Order." There were no meetings of the School Board and HEW "until the plan had been developed in almost final form." Manifestly, the Board acted throughout the period when HEW was preparing its plan, in utmost good faith, enjoining HEW "to meet the directive" of the Court and relying on that specialized agency to prepare an acceptable plan. The Board approved, with a slight, inconsequential modification, the plan as prepared by HEW and submitted it to the Court on May 11, 1970. The District Court faults the Board for submitting this plan, declaring that the plan "failed to pass legal muster because those who prepared it were limited in their efforts further to desegregate by self-imposed restrictions on available techniques"¹⁷ and emphasizing that its unacceptability "should have been patently obvious in view of the opinion of the United States Court of Appeals for the Fourth Circuit in *Swann v. Charlotte-Mecklenburg Board of Education* 431 F.2d (138), (4th Cir. 1970), which had been rendered on May 26, 1970."¹⁸ The failure to use "available techniques" such as "busing and satellite zonings" and whatever "self-imposed limitations" may have been placed on the planners were not the fault of the School Board but of HEW, to whom the School Board, with the seeming approval of the Court and the plaintiffs, had committed without any restraining instructions the task of preparing an acceptable plan. Moreover, at the time the

¹⁷ See, 53 F.R.D. at p. 31.

¹⁸ See, 338 F. Supp. at p. 71.

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plan was submitted to the Court by the School Board, *Swann* had not been decided by this Court. And when the Court disapproved the HEW plan, the Board proceeded in good faith to prepare on its own a new plan that was intended to comply with the objectives stated by the Court.

The Court did find some fault with the Board because, "Although the School Board had stated, as noted, that the free choice system failed to comply with the Constitution, producing as it did segregated schools, they declined to admit during the June (1970) hearings that this segregation was attributable to the force of law (transcript, hearing of June 20, 1970, at 322)" and that as a result, "the plaintiffs were put to the time and expense of demonstrating that governmental action lay behind the segregated school attendance prevailing in Richmond."¹⁹ This claim of obstruction on the part of the Board is based on the latter's refusal to concede, in reply to the Court's inquiry, "that free choice did not work because it was *de facto* segregation".²⁰ It is somewhat difficult to discern the importance of determining whether the "free choice" plan represented "*de facto* segregation" or not: It was candidly conceded by the School Board that "free choice", as applied to the Richmond schools, was impermissible constitutionally, and this concession was made whether the unacceptability was due to "*de facto*" segregation or not.²¹ In a school system such as that of Richmond, where there had been formerly *de jure* segregation, *Green* imposed on the School Board the "duty to eliminate racially identifiable

¹⁹ See, 53 FRD at p. 30.

²⁰ See Joint Appendix 47, Tr. p. 322.

²¹ See 345 F.2d 322.

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schools even where their preservation results from educationally sound pupil assignment policies.”²² The School Board’s duty was to eliminate, as far as feasible, “racially identifiable schools” in its systems.²³ The real difficulty with achieving this result was that, whatever may have been the reasons for its demographic and residential patterns,²⁴

²² 82 Har. L. Rev. 113; cf., *Ellis v. Board of Public Instruction of Orange Co., Fla.* (5th Cir. 1970), 423 F.2d 203, 204.

²³ The very term “racially identifiable” has received no standard definition. In *Beckett v. School Board of City of Norfolk* (D.C. Va. 1969), 308 F. Supp. 1274, 1291, rev. on other grounds, 434 F.2d 408, the Court found that a school in which the representation of the minority group was 10 per cent or better was not “racially identifiable”. Dr. Pettigrew, the expert witness on whom the District Court in this proceeding relied heavily and who testified in *Beckett*, used 20 per cent in determining “racially identifiable” school population. See 308 F. Supp. 1291. The recent case of *Yarbrough v. Hulbert-West Memphis School Dist. No. 4* (8th Cir. 1972), 457 F.2d 333, 334, apparently would define as “racially identifiable” any school where the minority, whether white or black, was less than 30 per cent. The District Court in this proceeding would, in its application of the term “racially identifiable”, construe the term as embracing the idea of a “viable racial mix” in the school population, which will not lead to a desegregation of the system. 338 F. Supp. at pp. 194-5. Actually, as Dr. Pettigrew indicated, it would seem the term “racially identifiable” has no fixed definition and, its application, will vary with the circumstances of the particular situation, just as a plan of desegregation itself will vary, since, as the Court said in *Green, supra*, at p. 439, “There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case.”

²⁴ That school policy is generally a minimal factor in such situation, see 85 Har. L. Rev. 77. In fact, the use of zoning and restrictive covenants as instruments of segregation is far more typical of northern than southern communities. See, McCloskey, *The Modern Supreme Court* (Har., 1972), pp. 109-10:

“In fact, the maintenance of ‘black ghettos’ in the cities was north’s substitute for the segregation laws of the south * * * .”

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there was, as the Court later reluctantly recognized, no practical way to achieve a racially balanced mix, whatever plan of desegregation was adopted. With a school population approximately 65 per cent black, it was not possible to avoid having schools that would be heavily black.²⁵ The constitutional obligation thus could, in that setting, only have as its goal the one stated by the District Court, i.e., "to the extent feasible within the City of Richmond."²⁶ Indeed, it was the very intractability of the problem of achieving a "viable racial mix" that prompted the Court to suggest in July, 1970, that it might be appropriate for the defendant School Board to discuss with the school officials of the contiguous counties the feasibility of consolidation of the school districts, "all of which may tend to assist them in their obligation".²⁷

The Court's finding of obstruction particularly centers on the substitute plan which the School Board proposed on July 23, 1970, in accordance with the Court's previous directive. It found two objections to the plan. The objections are actually part of one problem, i.e., transportation. The first objection was that the plan did not require as much integration in the elementary grades as in the higher grades. Such a difference in treatment, however,

The President's Committee on Civil Rights reported in 1947 that the amount of land covered by racial restriction in Chicago was as high as 80 per cent and that, according to students of the subject, virtually all new subdivisions are blanketed by these covenants."

²⁵ Cf., *United States v. Choctaw County Board of Education* (D.C. Ala. 1971), 339 F. Supp. 901, 903.

²⁶ See 325 F. Supp. 835.

²⁷ See Joint Appendix 74.

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the Court found had some support in both *Swann*²⁸ and *Brewer*.²⁹ An increase in the desegregation of the elementary grades, however, depended upon the purchase and use of a considerable amount of transportation equipment by the board; and this was the basis of the second criticism that "the School Board had in August (1970) still taken no steps to acquire the necessary equipment."³⁰ The Court repeated this criticism with reference to the plaintiffs' mid-term motion made in the fall of 1970 for an amendment of defendant's approved interim plan which, for implementation, "required the purchase of transportation facilities which the School Board still would only say it would acquire if so ordered."³¹ Yet at the very time when the action of the School Board in failing to buy buses was thus being found to be "unreasonably obdurate", the Court itself was declaring on August 7, 1970, that "it seems to me it would be completely unreasonable to force a school system that has no transportation, and you all don't have any to any great extent, to go out and buy new busses when the United States Supreme Court may say that is wrong."³² Again, as late as January 29, 1971, the Court, in refusing to order the immediate implementation

²⁸ 431 F.2d 138.

²⁹ In 324 F. Supp. 468, the Court said:

"Language and holdings in both *Swann* and *Brewer v. School Board of City of Norfolk*, 434 F.2d 408 (4th Cir. June 22, 1970), indicate that a school board's duty to desegregate at the secondary level is somewhat more categorical than at the elementary level."

³⁰ 53 FRD 32.

³¹ 53 FRD 32-3.

³² Joint Appendix 92-3.

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of a plan submitted by the plaintiffs, which "would require the acquisition of additional transportation facilities not then available", found that "the possibility that forthcoming rulings (by the Supreme Court)" might make such acquisition unnecessary and a needless expense induced "the Court to decide that immediate reorganization of the Richmond system would be 'unreasonable' under *Swann*." ³³ If the Court did not feel it was reasonable in January, 1971, to require the Board to purchase additional buses, it certainly cannot be said that, in the period of uncertainty in 1970, the failure of the School Board to propose such acquisition, justifies any charge of unreasonableness, much less obdurateness or action "in defiance of law" or taken in "bad faith".

The conclusion of the District Court that the Board was "unreasonably obdurate", it seems, was influenced by the feeling, repeated in a number of the Court's opinions, that "Each move (by the Board) in the agonizingly slow process of desegregation has been taken unwillingly and under coercion".³⁴ The record, as we read it, though, does not indicate that the Board was always halting, certainly not obstructive, in its efforts to discharge its legal duty to desegregate; nor does it seem that the Court itself had always so construed the action of the Board. In June, 1970, the Court remarked, that, while not satisfied "that every reasonable effort has been made to explore" all possible means of improving its plan, it was "satisfied Dr. Little and Mr. Adams (the school administrators) have been working day and night diligently to do the best they

³³ See, Joint Appendix 132, 134, 135.

³⁴ 338 F. Supp. 103; see, also, 53 FRD 39.

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could, the School Board too.”³⁵ It may be that in the early years after *Brown* the School Board was neglectful of its responsibility, but, beginning in the middle of 1965, it seems to have become more active. Moreover, the promptness and vigor with which the Board adopted and pressed the suggestion of the Court that steps be considered in connection with a possible consolidation of the Richmond schools with those of Chesterfield and Henrico Counties must cast doubt upon any finding that the Board was unwilling to explore any avenue, even one of uncharted legality, in the discharge of its obligation. The Court wrote its letter suggesting a discussion with the other counties looking to such possible consolidation on July 6, 1970. The letter was addressed to the attorneys for the plaintiffs but a copy went to counsel for the School Board. Nothing was done by counsel for the plaintiffs as a result of this letter but on July 23, 1970, the Board moved the Court for leave to make the School Boards of Chesterfield and Henrico Counties parties and to serve on them a third-party complaint wherein consolidation of their school systems with that of the Richmond systems would be required. The Board thereafter took the “laboring oar” in that proceeding. Neither it nor its counsel has been halting in pressing that action, despite substantial local disapproval.³⁶

It is clear that the Board, in attempting to develop a unitary school system for Richmond during 1970, was not operating in an area where the practical methods to be used were plainly illuminated or where prior decisions had not left a “lingering doubt” as to the proper pro-

³⁵ See, Joint Appendix 92.

³⁶ See, 338 F. Supp. 67, 100-1.

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cedure to be followed.³⁷ Even the District Court had its uncertainties. All parties were awaiting the decision of the Supreme Court in *Swann*. Before *Swann* was decided, however, the parties were engaged in an attempt to develop a novel method of desegregating the Richmond school system for which there was not at the time legal precedent. Nor can it be said that there was not some remaining confusion, at least at the District level, about the scope of *Swann* itself.³⁸ The frustrations of the District Court in its commendable attempt to arrive at a school plan that would protect the constitutional rights of the plaintiffs and others in their class, are understandable, but, to some extent, the School Board itself was also frustrated. It seems to be unfair to find under these circumstances that it was unreasonably obdurate.

II.

The District Court enunciated an alternative ground for the award it made. It concluded that school desegregation actions serve the ends of sound public policy as expressed in Congressional acts and are thus actually public

³⁷ See, *Local No. 149 I.U., U.A., A. & A.I.W. v. American Brake Shoe Co.* (4th Cir. 1962), 298 F.2d 212, 216, cert. den. 369 U.S. 873, 82 S. Ct. 1142, 8 L. Ed. 2d 276.

In *Pierson v. Ray*, 386 U.S. 547, 557 (1967), it was stated that "a police officer is not charged with predicting the future course of constitutional law." By like token, it would seem a school board should not be required, under penalty of being charged with obdurateness and being saddled with onerous attorneys' fees, to anticipate or predict the future course of "constitutional law" in the murky area of school desegregation.

³⁸ See, *Winston-Salem/Forsyth County Board of Education v. Scott*, opinion of Chief Justice Burger, dated August 31, 1971, — U.S. —.

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actions, carried on by "private-attorneys general", who are entitled to be compensated as a part of the costs of the action. Specifically, it held that "exercise of equity power requires the Court to allow counsels' fees and expenses, in a field in which Congress has authorized broad equitable remedies 'unless special circumstances would render such an award unjust.'" ³⁹ Apparently, though, the District Court would limit the application of this alternative ground for the award to those situations where the rights of the plaintiff were plain and the defense manifestly without merit. This conclusion follows from the fact that the Court finds this right of an award only arose in 1970 and 1971, when it might be presumed from previous expressions in the opinion, the Court concluded that all doubts about how to achieve a non-racial unitary school system had been resolved, and any failure of a school system to inaugurate such a system was obviously in bad faith and in defiance of law. That follows from this statement made by way of preface to its exposition of its alternative ground:

"Passing the question of the appropriateness of allowing fees on the basis of traditional equitable standards, the Court is persuaded that in 1970 and 1971 the character of school desegregation litigation has become such that full and appropriate relief must include the award of expenses of litigation. This is an alternative ground for today's ruling." ⁴⁰

If this is the basis for the Court's alternative ground, it really does not differ from the rule that has heretofore

³⁹ See 53 FRD at p. 42.

⁴⁰ See, 53 FRD at p. 41.

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been followed consistently by this Court that, where a defendant defends in bad faith or in defiance of law, equity will award attorney's fees. The difficulty with the application of the Court's alternative ground for an award on this basis, though, is its assumption that by 1970 the law on the standards to be applied in achieving a unitary school system had been clearly and finally determined. As we have seen, there was no such certainty in 1970; indeed it would not appear that such certainty exists today. And it is this very uncertainty that is the rationale of the decision in *Kelly v. Guinn* (9th Cir. 1972), 456 F.2d 100, 111, where the Court, citing both the District Court's opinion involved in this appeal (53 FRD 28), and *Lee v. Southern Home Sites Corp.* (5th Cir. 1970), 429 F.2d 290, 295-296,⁴¹ sustained a denial of attorney's fees in a school integration case, because:

"First, there was substantial doubt as to the school district's legal obligation in the circumstances of this case; the district's resistance to plaintiffs' demands rested upon that doubt, and not upon an obdurate refusal to implement clear constitutional rights. Second, throughout the proceedings the school district has evinced a willingness to discharge its responsibilities under the law when those duties were made clear."

If, however, an award of attorney's fees is to be made as a means of implementing public policy, as the District Court indicates in its exposition of its alternative ground of award, it must normally find its warrant for such action

⁴¹ See, also, *Lee v. Southern Home Sites Corp.* (5th Cir. 1971), 444 F.2d 143.

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in statutory authority.⁴² Congress, however, has made no provision for such award in school desegregation cases. Legislation to such effect, included in a bill to assist in the integration of educational institutions, was introduced in 1971 in Congress but it was not favorably considered. Moreover, in the Civil Rights Act of 1964, it expressly provided for such award in both the equal employment opportunity⁴³ and the public accommodations sections⁴⁴ but pointedly omitted to include such a provision in the public education section.⁴⁵ In giving effect to this contrast in the several titles of the Civil Rights Act of 1964, and in affirming that any award of attorney's fees in a school desegregation case must be predicated on traditional equitable standards, the Court in *Kemp v. Beasley* (8th Cir. 1965), 352 F.2d 14, 23, said:

"Congress by specifically authorizing attorney's fees in Public Accommodation cases and not making allowance in school segregation cases clearly indicated that insofar as the Civil Rights Act is concerned, it does not authorize the sanction of legal fees in this type of action. The doctrine of *Expressio unium est exclusio alterius* applies here and is dispositive of this contention."

⁴² See *Fleischmann v. Maier Brewing Co.* (1967), 386 U.S. 714, 717, 87 S. Ct. 1404, 18 L. Ed. 2d 475; see, also, *Brewer v. School Board of City of Norfolk, Virginia*, *supra*, note 22, at p. 950.

⁴³ See, Section 2000 e-5(k), 42 U.S.C.

⁴⁴ See, Section 2000 a-3(b), 42 U.S.C.

⁴⁵ Section 2000 c-7, 42 U.S.C.; and see, *United States v. Gray* (D.C. R.I. 1970), 319 F. Supp. 871, 872-3. See, however, Note 57, *post*.

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The same conclusion was reached in *Monroe v. Board of Com'rs. of City of Jackson, Tenn.* (6th Cir. 1972), 453 F.2d 259, 262-3, note 1, where an award though sustained, was sustained on the ground of "unreasonable, obdurate obstinacy" as enunciated in *Bradley v. School Board of Richmond, Virginia* (4th Cir. 1965), 345 F.2d 310, 321, and not as a vehicle for the enforcement of public policy. To the same effect is *United States v. Gray, supra*.

It is suggested that *Mills v. Electric Auto-Lite* (1970), 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593, and *Lee v. Southern Home Sites Corp.* (5th Cir. 1971), 444 F.2d 143, sustain this alternative award as in the nature of a sanction designed to further public policy. Any reliance on *Mills* is "misplaced, however, because conferral of benefits, not policy enforcement, was the *Mills* Court's stated justification for its holding." 50 *Tex. L. Rev.* 207 (1971).⁴⁶ In fact, the award in *Mills* was based on the same concept of benefit as was used to support the award in *Trustees v. Greenough* (1881), 105 U.S. 527. 36 *Mo. L. Rev.* 137 (1971). Equally inapposite is *Lee*. Though filed under Section 1982, it was like unto, and, so far as relief was concerned, should be treated similarly as an action under Section 3612(c), 42 U.S.C., in which attorney's fees are allowable.⁴⁷ By this

⁴⁶ See, also, *Kahan v. Rosenstiel* (3d Cir. 1970), 424 F.2d 161, 166:

"In the *Mills* opinion, Justice Harlan noted that the plaintiffs' suit conferred a benefit on all the shareholders * * *." (Italics added.)

⁴⁷ See, particularly note 2, p. 147, 444 F.2d.

This case has been criticized in 50 *Tex. L. Rev.* 207. Thus, it finds untenable its attempt to identify its award with the statutory authorization provided in Section 3612(c), because, "Under the latter statute (section 3612) the court may not award attorney's fees to a plaintiff financially able to pay his own fees." (Page 208).

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reasoning, the Court sought to bring the award within the umbrella of a parallel specific statutory authorization.⁴⁸ There is no basis for such a rationale here.

If, however, the rationale of *Mills* is to be stretched so as to provide a vehicle for establishing judicial power justifying the employment of award of attorney's fees to promote and encourage private litigation in support of public policy as expressed by Congress or embodied in the Constitution, it will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination, and, even more difficult, which public policy warrants the encouragement of award of fees to attorneys for private litigants who voluntarily take upon themselves the character of private attorneys-general.⁴⁹ Counsel in environmental cases would claim such a role for their services.⁵⁰ The protection of historical houses and monuments against the encroachment of highways has been cloaked within the mantle of public interest and it would be argued should receive the encouragement of an award.⁵¹ Consumers' suits are

⁴⁸ *Knight v. Auciello* (1st Cir. 1972), 453 F.2d 852, is a similar case, involving discrimination proscribed by Section 1982, 42 U.S.C.

⁴⁹ See, Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 *University of Chicago L. Rev.* 316, at pp. 329-30 (1971).

⁵⁰ See, Section 4332(2), et seq., 42 U.S.C.; *Environmental Defense Fund v. Corps of Eng. of U. S. Army* (D.C. Ark. 1971), 325 F. Supp. 749; *Environmental Defense Fund, Inc. v. Corps of Engineers* (D.C. D.C. 1971), 324 F. Supp. 878; *Businessmen Affected Severely, etc. v. D.C. City Council* (D.C. D.C. 1972), 339 F. Supp. 793.

⁵¹ See, Section 461, 16 U.S.C., and Section 4331(b)(4), 42 U.S.C.; *West Virginia Highlands Conserv. v. Island Creek Coal Co.* (4th Cir. 1971), 441 F.2d 232; Cf., *Ely v. Velde* (D.C. Va. 1971), 321 F. Supp. 1088.

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clearly to be considered.⁵² Apportionment suits justify awards under this theory.⁵³ First Amendment rights are often spoken of as preferred constitutional rights. Attacks upon statutes infringing free speech would, under this theory, command an allowance. But it must be emphasized that whether the enforcement of Congressional purpose in all these cases commands an award of attorney's fees is a matter for legislative determination. And Congress has not been reticent in expressing such purpose in those cases where it conceives that such special award is appropriate. In many instances, where Congress has enacted statutes designed to further public purpose, it has bulwarked their enforcement with provisions for the allowance of counsel fees to attorneys for private parties invoking such statutes; in other cases it has denied such awards.⁵⁴ In some of the statutes authorizing such allowances, the award is, as in the statute involved in *Newman v. Piggie Park Enterprises* (1968), 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263, either mandatory or practically so; in others it is discretionary⁵⁵ and the granting of awards is generally made through the use of the same guidelines as motivate courts in making awards under the traditional equity rule. Should the courts, in those in-

⁵² See, 38 *University of Chicago L. Rev.* 316.

⁵³ Actually, an alternative award has been made in such a case. *Sims v. Amos* (3-judge ct. Ala. 1972), — F. Supp. — (filed March 17, 1972).

⁵⁴ See Annotation, 8 L. Ed. 2d 894, at pp. 922-32, for a listing of statutes authorizing an award of attorney's fees. To this list should be added Section 1640, 15 U.S.C. (Truth-in-Lending Act).

⁵⁵ See, for instance, Section 153, 43 U.S.C.; *United Transportation Union v. Soo Line RR Co.* (7th Cir. 1972), 457 F.2d 285.

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stances where Congress has failed to grant the right, review the legislative omission and sustain or correct the omission as the court's judgment on public policy suggests? This, it seems to us, would be an unwarranted exercise of judicial power. After all, Courts should not assume that Congress legislates in ignorance of existing law, whether statutory or precedential. Accordingly, when Congress omits to provide specially for the allowance of attorney's fees in a statutory scheme designed to further a public purpose, it may be fairly accepted that it did so purposefully, intending that the allowance of attorney's fees in cases brought to enforce the rights there created or recognized should be allowed only as they may be authorized under the traditional and long-established principles as stated in *Sprague v. Ticonic Bank* (1939), 307 U.S. 161, 166, 59 S. Ct. 777, 83 L. Ed. 1184. Such consideration, it would seem, was the compelling reason that prompted one commentator to offer the apt *caveat* that the determination of public policy as a predicate for such awards should be more safely left with Congress and not undertaken by the Courts. Thus, in 50 *Tex. L. Rev.* 209 (1971), it is stated:

"The decision, (referring to *Lee*) however, sanctions excessive judicial discretion that may emasculate the general rule against fee awards and inject more unpredictability into the judicial process. The legislature should formulate a rule that would promote predictability and utilize the power inherent in fee allocation to pursue the goals it desires to achieve, one of which would be equal access to the courts."

Even the author of the Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 *University*

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of *Chicago L. Rev.*, 316, though sympathetic to the extension of *Mills* to cover awards of attorney's fees in support of public policy, recognizes that a general policy, applicable to all cases, on the award of attorney's fees should be adopted, concluding its review of the subject with this comment:

"Logically, one of two things must happen: either judicial discretion to grant fees on policy grounds will result in universal fee shifting from the successful party, or the courts will withdraw to the traditional position, denying any fee transfer without specific statutory authorization. *Mills* represents an uneasy half-way house between these two extremes." (Page 336)

We find ourselves in agreement with the conclusion that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts.⁵⁶ This is especially true in school cases, where the guidelines are murky and where harried, normally uncompensated School Boards must tread warily their way through largely uncharted and shadowy legal forests in their search for an acceptable plan providing what the courts will hopefully decide is a unitary school system.

⁵⁶ It is interesting that in all the cases where the right to make an award for policy reasons has been stated, it has been stated simply as an alternative ground to a finding of unreasonable obduracy. See, 53 FRD at pp. 39-42, and *Lee, supra*, at p. 144. In *Sims, supra*, at p. —, the Court found that, "The history of the present litigation is replete with instances of the Legislature's neglect of, and even total disregard for, its constitutional obligation to reapportion." In short, no court has yet predicated an award exclusively upon the promotion of public policy.

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Accordingly, until Congress authorizes otherwise awards of attorney's fees in school desegregation cases must rest upon the traditional equitable standards as stated in *Bradley v. Richmond School Board* (4th Cir. 1965), 345 F.2d 310, which provide ample scope for the award in appropriate cases.

III.

After the above opinion had been prepared but not issued, the Congress enacted Section 718 of the Emergency School Aid Act. The appellees promptly called to the Court's attention this Section, suggesting that it provided an alternative basis for the award made. They construed the reference in the Section to "final order" to embrace any appealable order dealing with any issue raised in a school desegregation case. Any order which had been appealed and was pending on appeal, unresolved, on the effective date of the Section (i.e., July 1, 1972), they argued, could provide a proper vehicle for an award under the Section.^{56a}

Since this issue of the application of Section 718 was raised simultaneously in a number of other pending appeals, it was determined to withhold the above opinion for the time being, and to consider *en banc* the reach of

^{56a} During the course of the oral argument counsel for the appellees was asked to define the term "final order" as used in Section 718. His reply was,

" * * * there is mention of final order in the legislative material—they use that term rather than a final judgment because in recognition of the peculiar nature of school cases,—that is you may have a wave of litigation that would end up in a final decision by this court or the Supreme Court and then the case would again be relitigated later—that order which is appealable is a final order."

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Section 718, as applied both to this case and to the other related appeals. Such *en banc* hearing has been had and the Court has concluded that Section 718 does not reach services rendered prior to June 30, 1972.⁵⁷

Were it to be construed as extending to any "final order", entered as "necessary to secure compliance", and pending unresolved on the effective date of the Act (which is the plaintiffs' construction of the sweep of the Section), such Section could not be used as a vehicle to validate this award. This is so because there was no "final order" pending unresolved on appeal on June 30, 1972, to which this award could attach. The only proceeding pending unresolved in this case on May 26, 1971, when the District Court issued its order allowing attorney's fees, was the action begun on motion of the School Board itself to require the merger of the Richmond schools with those of the contiguous counties of Chesterfield and Henrico. All orders issued prior to that date in this desegregation action had long since become final and were not pending on appeal either on May 26 or on the date Section 718 became effective. Thus, on August 17, 1970, the District Court had approved the School Board's interim plan for the school year 1970-1. There was no appeal perfected from that order. The plaintiffs had moved on December 9, 1970 for additional relief but that motion had been denied by an order dated January 29, 1970, which, incidentally, was the same date used by the District Court for the cut-off of its allowance of attorney's fees. Again, there was no

⁵⁷ *James v. The Beaufort County Board of Education* (72-1065); *Copeland, et al. v. School Board of the City of Portsmouth, Virginia, et al.* (Nos. 71-1993 and 71-1994); *Thompson v. The School Board of the City of Newport News, Virginia, et al.* (Nos. 71-2032 and 71-2033), filed October —, 1972.

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appeal from that order dismissing plaintiffs' application for relief, and, even if it be assumed that plaintiffs' attorneys are to be granted attorneys' fees when they do not prevail (an assumption clearly not permitted under the language of Section 718), the proceeding under which that order was entered was not pending when Section 718 became effective.⁵⁸ To restate: The only proceedings pending undetermined by an order that had not become final on the date Section 718 became effective was the action begun by the School Board and resulting in the order of the District Court dated January 10, 1972.⁵⁹ That order, which, it may be assumed, is still pending since the School Board is presently seeking certiorari, was reversed by this Court⁶⁰ and, unless the decision of this Court is in turn reversed, it will not support any allowance of attorneys' fees, since Section 718 authorizes allowance only when plaintiffs have prevailed.

REVERSED.

⁵⁸ It is true that on January 29, 1971, the School Board submitted to the District Court its proposed plan for the operation of the Richmond schools for the school year 1971-2. There seems to have been either no dispute over this plan or the proposal was swallowed up in the more expansive merger action.

⁵⁹ 338 F. Supp. 67.

⁶⁰ 462 F.2d 1058.

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WINTER, *Circuit Judge*, dissenting:

The in banc court holds that this case is not governed by § 718 of Title VII, "Emergency School Aid Act," of the Education Amendments of 1972. P.L. 92-318; 86 Stat. 235; 1972 U.S. Code and Admin. News 1908, 2051. The panel concludes both that the Richmond School Board was not guilty of "unreasonable, obdurate obstinacy" and that plaintiffs were not entitled to recover counsel fees under the private attorney general concept. On all issues, I would conclude otherwise and I therefore respectfully dissent.

I.

Because I conclude not only that § 718 is applicable to this litigation, but also that, as a matter of statutory construction, its terms are met, I place my dissent from the panel's decision primarily on that ground. If, however, § 718 is treated as inapplicable to this case, I would affirm the district court, preferably on my concurring views in *Brewer v. School Board of City of Norfolk, Virginia*, 456 F.2d 943, 952-54 (4 Cir. 1972) cert. den. — U.S. — (1972). Even if the obdurate obstinacy test controls, I would still affirm. As I read the record, I can only conclude that for the period for which an allowance of fees was made, the Richmond School Board was obdurately obstinate. Commendably, it seized the initiative in vindicating plaintiffs' rights by seeking to sustain a consolidation of school districts; but this was a latter-day conversion that occurred after the district court suggested that consolidation be explored. Until that time the record reflects the Board's stubborn reluctance to implement Brown I (*Brown v. Board of Education*, 347 U.S. 483 (1954)) in the light of *Green v. County School Board of New Kent*

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County, Va., 391 U.S. 430 (1968); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter v. West Feliciana Parish School Board*, 396 U.S. 226 (1969); and, while the litigation was progressing, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The history of the litigation, as set forth in the opinion of the district court, is sufficient to prove the point. *Bradley v. School Board of City of Richmond, Virginia*, 53 F.R.D. 28, 29-33 (E.D. Va. 1971).

II.

I turn to the more important questions of the scope and application of § 718. Neither in the instant case, nor in *James v. The Beaufort County Board of Education*, — F.2d — (4 Cir. decided simultaneously herewith), does the majority articulate in other than summary form why § 718 should not apply to cases pending on its effective date (July 1, 1972). I conclude that it does apply, and in the face of the majority's silence, I must discuss the pertinent authorities at some length.

The text of § 178 is set forth in the margin.¹ Its enactment presents no question of retroactive application to this

Attorney Fees

¹ Sec. 718. Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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litigation. As I shall show, the issue of the allowance of counsel fees has been an issue throughout every stage of the proceedings; and the proceedings were not terminated when § 718 became effective on July 1, 1972, because this appeal was pending before us. This is not a case where a subsequent statute is sought to be applied to events long past and to issues long finally decided. Rather, it is a case which presents the concurrent application of a statute to an issue still in the process of litigation at the time of its enactment. *United States v. Schooner Peggy*, 1 Cranch 103 (1801), and *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), are the significant controlling authorities.

In *Peggy*, while an appeal was pending from a decision of the lower court in a prize case, the United States entered into a treaty with France, which if applicable would have required reversal. The treaty explicitly contemplated that it would be applicable to seizures that had taken place prior to the treaty's ratification where litigation had not been terminated prior to ratification. On the basis of the new treaty, the Supreme Court reversed the decision of the lower court. In the opinion of Mr. Justice Marshall, it was said:

It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction

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which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction confirming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

United States v. Schooner *Peggy*, supra, 1 Cranch at 109.

Peggy may be interpreted in two ways: Under a narrow interpretation the Court held only that, where the law changes between the decision of the lower court and an appeal, the appellate court must apply the new law if, by its terms, it purports to be applicable to pending cases. The decisional process, under this interpretation, requires the appellate court to examine the intervening law and to determine whether it was intended to apply to factual situations which transpired prior to the law's enactment. Since the treaty in *Peggy* explicitly applied to situations where the controversy was still pending, it followed that the statute should be applied in deciding the case. Certainly the facts of *Peggy* and much of the language of the opinion of Mr. Justice Marshall support this interpretation.

By a broader interpretation, *Peggy* may be considered to hold that where the law has changed between the occurrence of the facts in issue and the decision of the appel-

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late court and where the controversy is still pending, the appellate court must apply the new law, unless there is a positive expression that the new law is not to apply to pending cases. This is the interpretation of *Peggy* which found its final expression in *Thorpe*. But before turning to *Thorpe* it is well to consider intervening decisions.

In *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941), the Court held that a federal appellate court in exercising diversity jurisdiction must follow a state court decision which was subsequent to and contradicted the district court decision. In *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23 (1940), the Court held that the appellate court must apply an intervening federal statute where the case is pending on appeal. However, in *Carpenter*, the statute explicitly indicated that it was to apply to pending cases. In *United States v. Chambers*, 291 U.S. 217 (1934), the Court held that indictments returned pursuant to the eighteenth amendment, and before the adoption of the twenty-first amendment, must be dismissed after passage of the twenty first amendment even though the acts when committed were crimes. See also *Ziffrin v. United States*, 318 U.S. 73 (1943). Then, in *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court drew a firm distinction between those cases where an appeal is still pending and those that are final ("where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . .," 381 U.S. at 622, n. 5). The Court held that *Mapp v. Ohio*, 367 U.S. 643 (1961), applied to pending cases but not to final cases. It discussed the previous decisions to which reference has been made and concluded that "[u]nder our cases . . . a change in law will be given effect while a case is on direct review.

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...” 381 U.S. at 627. It should be noted, however, that the Court was by no means consistent in applying this rule after *Linkletter*. See *Desist v. United States*, 394 U.S. 244, 256-60 (1969) (Harlan, J., dissenting).

In *Thorpe*, the Housing Authority gave the tenant notice to vacate in August, 1965, but refused to give its reasons for the notice. When the tenant refused to vacate, the Authority brought an action for summary eviction in September, 1965, and prevailed. Actual eviction, however, was stayed during the pendency of the litigation. In 1967, before the Supreme Court decided the case, the Department of Housing and Urban Development issued a circular directing that tenants must be given reasons for their eviction. The Supreme Court held that housing authorities must apply the HUD circular “before evicting any tenant still residing in such projects on the date of this decision.” 393 U.S. at 274. Relying on *Peggy*, it explained that “[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision,” although it recognized that “[e]xceptions have been made to prevent manifest injustice. . . .” 393 U.S. at 281-82.

The difference between *Thorpe* and *Peggy* is that the HUD circular did not indicate that it was to be applied to pending cases or to facts which had transpired prior to its issuance. Indeed, the circular stated that it was to apply “from this date” (the date of issuance). 393 U.S. at 272, n. 8. Thus, *Thorpe* held that even where the intervening law does not explicitly or implicitly contemplate that it would be applied to pending cases, it, nevertheless, must be applied at the appellate level to decide the case. The line of cases from *Peggy* to *Thorpe* dictates the application of § 718 in the instant case, irrespective of legis-

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lative intent. Simply stated, since the law changed while the case (the lawyers' fees issue) was still pending before us, the new law applies.

The School Board contends that *Thorpe* does not erase the long-standing rule of construction favoring prospective application. It argues that *Thorpe* did not present a retroactivity question since the tenant had not yet been evicted. It places great reliance on the "tenant still residing" language in the opinion. The School Board concludes that since the tenant had not yet been evicted, the HUD circular was not retroactively applied but was currently applied to a still pending eviction. With respect to the legal services in issue in the instant case, the Board argues that the *Thorpe* rule does not apply since the performance of legal services was a completed act prior to the effective date of § 718.

While the Board's premise regarding the interpretation of *Thorpe* may not be faulted, its analogy is inapt and its conclusion incorrect. True, the rendition of legal services in the instant case had been completed (except for legal services on appeal), but the dispute over who was liable for payment was very much alive, as alive as the dispute over eviction in *Thorpe*. The proper analogy is not between rendition of legal services and the eviction litigation, but between rendition of legal services and the Housing Authority's termination of the lease and notice to vacate. These are the completed acts. What lingers is the dispute over who is right, and it lingers in both cases. Therefore, as in *Thorpe*, here there is no retroactivity issue. *Thorpe* governs and § 718 applies unless it is rendered inapplicable because one or more of its provisions has not been

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met. See *Bassett v. Atlanta Independent School Dist.* No. 1550 (E.D. Tex. August 28, 1972).³

III.

Since *Thorpe* governs, legislative history is not relevant, unless it unequivocally shows an intention on the part of Congress that the statute not apply to live issues in currently pending cases. The legislative history of § 718 provides no such expression of intent. To the extent that it proves anything, it supports the conclusion that § 718 should apply to live issues in currently pending cases.

³ It must be recognized that there are some discordant notes in the case law: In *Soria v. Oxnard School Dist. Board*, — F.2d — (9 Cir. August 21, 1972), it was held, in a per curiam opinion, that § 803 of the Education Amendments of 1972, which postponed the effectiveness of busing orders for the purpose of achieving racial balance until all appeals have been exhausted, had no application to a case pending at the time of its effective date in which busing, pursuant to an integration plan, is already in operation. There is no mention, however, of *Thorpe*.

In *Greene v. United States*, 376 U.S. 149 (1964), the Court refused to apply an intervening Department of Defense regulation to a pending case, reasoning in retroactivity language. But this case was obviously one where "retroactivity" would work "manifest injustice." See *Thorpe*, *supra* at 282 n. 43. Cases construing the Criminal Justice Act, 18 U.S.C.A. § 3006A (1970), which provides court-appointed attorneys with fees from federal funds have held that it applies only where counsel was appointed after the Act, or at least, only where counsel's assistance was rendered after the Act. Compare *United States v. Pope*, 251 F.S. 331 (D. Neb. 1966) with *United States v. Dutsch*, 357 F.2d 331 (4 Cir. 1966); *United States v. Thompson*, 356 F.2d 216 (2 Cir. 1965) cert. den. 384 U.S. 964 (1966); *Dolan v. United States*, 351 F.2d 671 (5 Cir. 1965) (per curiam). But that Act involved expenditures of federal appropriations which, by the terms of the Act, would not become effective until a year after enactment, so that it may be fairly said that there was a clear legislative intention not to make the terms of the Act applicable to pending cases.

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Two clauses of § 718 bear on the issue. As originally proposed and reported, § 718 provided for a federal fund of \$15 million from which counsel would be paid "for services rendered, and the costs incurred, after the date of enactment . . ." S. 683, § 11 (Quality Integrated Education Act). The Senate Committee on Labor and Public Welfare reported the bill, with this clause intact, as § 1557. Sen. Rep. No. 92-61. 92nd Cong. 1st Sess. pp. 55-56.

The School Board places great stress on this language as indicating a strictly prospective legislative intent. It fails to point out, however, that the federal funding, as well as the "after the date" clause, were deleted by floor amendment prior to the passage of the Act. This floor amendment can be construed to indicate that Congress' ultimate intent was indeed the opposite of that urged by the Board. The "after the date" clause and federal funding seem to have gone in tandem. Given the nature of federal appropriation, prospective application would be a sensible requirement. Compare Criminal Justice Act, 18 U.S.C.A. § 3006A (1970). By the deletion of federal funding, the reason for restricting payment of attorneys' fees for services performed after the date of enactment disappeared.

Secondly, the School Board points to the language in the committee report which refers to "additional efforts," but the sentence is phrased in the conjunctive. It reads: "\$15 million is set aside *for additional efforts* under this bill and under Title I of the Elementary and Secondary Education Act of 1965 * * * *and for vigorous nation-wide enforcement of constitutional and statutory protection against all forms of discrimination*" (emphasis added). Whether "additonal efforts" modifies everything that follows, or

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just what precedes the conjunction "and", is debatable and a rather unenlightening inquiry.

Thus, nothing on the face of § 718, or in its legislative history, conclusively manifests a congressional desire that the *Thorpe* rule applying new legislation to live issues in pending litigation should not prevail. I turn to the question of its precise application.

IV.

Section 718 empowers the court to award counsel fees "in its discretion, upon a finding that the proceedings were necessary to bring about compliance. . . ." The private attorney general rule of *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), governs the court's discretion. Under the *Piggie Park* standard, the court should award counsel fees "unless special circumstances would render such an award unjust." 390 U.S. at 402. See *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4 Cir. 1971). The language of § 718 is substantially similar to the counsel fee provisions in § 204(b) of Title II and § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a-3(b), 2000e-5(k), and § 812(c) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. § 3612(c), all of which are governed by *Piggie Park*. Moreover, the legislative history of § 718 reveals that its purpose is the same as the counsel fee provisions in Titles II, VII, and VIII. 117 Cong. Rec. S. 5484, 5490 (Daily Ed. April 22, 1971); *id.* S. 5537 (Daily Ed. April 23, 1971). The additional standard in § 718 requiring the court to find that the suit was necessary to bring about compliance does not modify the *Piggie Park* standard, because its purpose, as revealed by the legislative history, is to deter champertous

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claims and the unnecessary protraction of litigation. 117 Cong. Rec. S. 5485, 5490-91 (Daily Ed. April 22, 1971). In the instant case, the district court found that suit was necessary to bring about compliance and it also found, at least implicitly, that there were no exceptional circumstances which would render an award of counsel fees against the School Board unjust. These findings are not clearly erroneous and hence counsel are entitled to some allowance of fees under § 718 as construed by *Piggie Park*.

V.

Although § 718 should be applied to legal services, whenever rendered, in connection with school litigation culminating in an order entered after its effective date (July 1, 1972), § 718 will not support affirmance of the precise award made by the district court in this case. It would, however, support a larger award to compensate for legal services rendered over a longer period.

The district court's award was for legal services rendered from March 10, 1970, the date when plaintiff filed a motion for further relief because of the decisions in *New Kent County*, supra, *Alexander*, supra, and *Carter*, supra, to January 29, 1971, the date on which the district court declined to implement plaintiff's plan. Manifestly, the entry of that order cannot support an award of counsel fees for services to the date of its entry because the order did not grant relief to the parties seeking to recover fees—a condition precedent to the award of fees as set forth in § 718. But, a recitation of the history of the litigation shows that counsel fees should be awarded for all legal services rendered from March 10, 1970 to April 5, 1971, the date on which the district court entered an order

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approving the plan under which the Richmond schools are presently being operated, and thereafter for legal services rendered in this appeal.

The essential dates in the history of the litigation follow: The motion for further relief was filed March 10, 1970. Appended thereto was an application for an award of reasonable attorneys' fees. After admitting that its schools were not then being constitutionally operated, the Board filed a plan (Plan 1) to bring the operation of the schools into compliance with the Constitution. After hearings, the district court disapproved Plan 1 (June 26, 1970) and directed the preparation and filing of a new plan. Plan 2 was filed July 23, 1970, and hearings were held on it. It, too, was disapproved as an inadequate long-range solution. But, because there was insufficient time to prepare, file, and consider another plan before the beginning of the next school term, Plan 2 was ordered into effect on August 17, 1970, for the term commencing August 30, 1970, and the Board was also ordered to make a new submission. The Board appealed from the order implementing Plan 2 and obtained a delay in briefing from this court. The appeal was never heard, because, having been effectively stayed, it was rendered moot by later orders. Before Plan 3 was filed, plaintiffs sought further relief for the second semester of the 1970-71 school year, but Plan 3 was filed (January 15, 1971) before they could be heard and their motion was denied on January 29, 1971, the terminal date for the allowance of compensation in the order appealed from. Plan 3 contained three parts—it was a restatement of Plans 1 and 2, and it contained a new third proposal. The Board urged the adoption of the Plan 2 aspect of Plan 3; but, on April 5, 1971, the district court ordered

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into effect for the 1971-72 school year the new third proposal. This is the plan under which the Richmond schools are presently operating.³

To this summary there need only be added that on August 17, 1970, the district court ordered the parties to confer on the subject of counsel fees. Plaintiffs filed on March 5, 1971, a memorandum in support of their request for an allowance; the court, on March 10, 1971, ordered that further memoranda and evidentiary materials with regard to the motion for counsel fees be filed; and these were filed on March 15, 1971. The order directing the payment of counsel fees was entered May 26, 1971, after the entry of the order approving and implementing Plan 3.

The majority concludes that § 718 was rendered inapplicable because the order appealed from was entered May 26, 1971, a date on which there was no "final order" entered as "necessary to secure compliance." This conclusion seems to me to be overly technical and not in accord with the facts.

The request for counsel fees was made when the motion for additional relief was filed on March 10, 1970. While very much alive throughout the proceedings, properly, the motion was not considered until the district court could approve a plan for a unitary system of schools for Richmond which was other than an interim plan. That approval was forthcoming on April 5, 1971, and promptly thereafter the district court addressed itself to the question of

³ Of course, there were even still further proceedings culminating in an order to consolidate the Richmond, Henrico County and Chesterfield School Districts, but this court set that order aside in *Bradley v. The School Board of the City of Richmond, Virginia*, — F.2d — (4 Cir. June 5, 1972), application for cert. filed October —, 1972.

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allowance of counsel fees. The approval of a permanent plan was not easily arrived at. Because the proposals of the Richmond School Board were constitutionally unacceptable, except on an interim basis, this approval was arrived at in several steps: (a) disapproval of Plan 1, (b) interim approval of Plan 2, (c) disapproval of additional interim relief, and (d) approval of Plan⁷3.

Certainly, § 718 is not to be so strictly construed that any counsel fees allowable thereunder must be allowed the very instant that an order granting interim or permanent relief is entered. A request for fees may present difficult questions of fact and require the taking of evidence. The burden of deciding these questions should not be added to the simultaneous burden of deciding the often very complex question of what is a constitutionally acceptable desegregation plan; rather, the issues should be severed and the question of counsel fees decided later so long as the issue of counsel fees had been present throughout the litigation and has not been raised as an afterthought after the school desegregation plan has become final. These practical considerations, plus the fact that every stage in the proceedings has been a part of an overall transition from unconstitutionally operated schools in Richmond to constitutionally operated schools, lead me to the conclusion that the exact terms and conditions of § 718 have in the main been met.

While I therefore conclude that there was a sufficient nexus between the request for counsel fees and the entry of a final order necessary to obtain compliance with the Constitution so as to warrant invoking § 718, I think that § 718 requires that the district court redetermine the allowance. As previously stated, the district court made an

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allowance for services to the date that plaintiffs' request for additional interim relief was denied. If the various steps for arriving at an overall desegregation plan for Richmond are severed, § 718 would not permit an allowance for services leading to the order of January 29, 1971, since on that date plaintiffs were denied the additional interim relief they prayed and § 718 permits an allowance only to the prevailing party. However, plaintiffs would be entitled to an allowance for services beyond January 29, 1971, up to April 5, 1971, the date of approval of Plan 3, because on that date they became the prevailing party and they obtained an order, still in effect, which required the schools of Richmond to be operated agreeably to the Constitution. I would therefore vacate the judgment and remand the case for a redetermination of the amount of the allowance—in short, I would require that counsel be compensated for their services to and including April 5, 1971 and also their services on appeal in this case.

**Opinion of United States Court of Appeals
in *Thompson* Action**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 71-2032 and 71-2033
FRANK V. THOMPSON, *et al.*,
Appellants,

v.

SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, *et al.*,
Appellees.

Nos. 71-1993 and 71-1994
MICHAEL COPELAND, *et al.*,
Appellants,

v.

SCHOOL BOARD OF THE CITY OF PORTSMOUTH, *et al.*,
Appellees.

No. 72-1065
NATHANIEL JAMES, *et al.*,
Appellees,

v.

BEAUFORT COUNTY BOARD OF EDUCATION,
Appellant.

(Decided November 29, 1972)

*Opinion of United States Court of Appeals
in Thompson Action*

Before

HAYNSWORTH, *Chief Judge*,
WINTER, CRAVEN, BURZNER, RUSSELL and FIELD,
Circuit Judges, sitting en banc.

PER CURIAM:

We ordered *en banc* consideration of lawyer fee claims in these school cases to consider the extent of the applicability of § 718 of the Emergency School Aid Act of 1972. In the City of Portsmouth and the Beaufort County cases, however, apparently adequate fees are allowable on other bases. The precise extent of the reach of § 718 in those cases, therefore, now appears academic.

In the Newport News case, most of the legal services are yet to be rendered, and we are unanimously of the view that, if relief is granted, fees will be allowable under § 718 for those future services. The division within the Court as to the application of § 718 will have some bearing upon any ultimate allowance of fees in that case, though less than was supposed when reargument was requested.

The Court is unanimously of the view that it should apply § 718 to any case pending before it after the Section's enactment. This is consistent with the principle of *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, most recently enunciated in the Supreme Court in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268.

A majority of the Court, however, is of the view that only legal services rendered after the effective date of § 718 are compensable under it. Those members of the Court invoke the principle that legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the statute applied in that manner. They do not find such an intention

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from the omission of a provision in an earlier draft expressly limiting its application to services rendered after its enactment, when the earlier draft was extensively revised and there is no affirmative expression by any member of Congress of an intention that it should be applied to services rendered prior to its enactment.

A minority of the Court would apply § 718 to legal services, whenever rendered, in connection with school litigation culminating in an order entered after June 30, 1972. In their view, someone must pay the fee, and a statutory placement of the burden of payment on school boards is not a retroactive application of the statute, though some of the services may have been rendered before its enactment as long as an order awarding relief, the fruit of the services, is entered afterwards.

The cases will be remanded for such further proceedings in the District Court as may be necessary in accordance with the views of the majority, applying § 718, when it may otherwise be applicable, only to services rendered after June 30, 1972.*

In the *Portsmouth* case, the District Court will award reasonable attorneys' fees on the principle of *Brewer v. The School Board of the City of Norfolk*, 4 Cir., 456 F.2d 943 (1972). In the *Beaufort County* case, the award heretofore made by the District Court is approved.

Remanded.

* In the *Newport News* case, on a completely different basis, the District Court made an award of attorneys' fees of \$750.00 in connection with services and events occurring before June 30, 1972. Since that award was not dependent upon § 718, nothing we say here should be construed to disturb it.

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in Thompson Action*

WINTER, *Circuit Judge*, concurring specially:

I concur in the judgment of the court to the extent that it directs the allowance of attorneys fees in the *City of Portsmouth*, *Beaufort County* and *Newport News* cases. For the reasons set forth in my separate opinion in *Bradley v. School Board of Richmond*, — F.2d — (4 Cir., No. 71-1774, decided), I would direct the allowance in all three cases on the basis that § 718 of the Emergency School Aid Act of 1972 applies to legal services rendered before the effective date of that enactment in cases pending on that date.



SUPREME COURT, U. S.

MAY 22 1973

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1972

No. 72-1322

CAROLYN BRADLEY, ET AL.,
Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF
RICHMOND, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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2

In The
Supreme Court of the United States

October Term, 1972

No. 72-1322

CAROLYN BRADLEY, ET AL.,
Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF
RICHMOND, ET AL.,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

The Respondents, the School Board of the City of Richmond, Virginia, and the individual members thereof, respectfully submit that this Court should deny the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 29, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 472 F.2d 318. The opinion of the Court of Appeals in the companion case, *Thompson v. School Board of City of Newport*

News, which was reprinted at pp. 78a-81a of Petitioners' Appendix is reported at 472 F.2d 177.

JURISDICTION

Petitioners' jurisdictional statement is accurate and the petition was timely filed pursuant to an order extending the time for filing entered by Mr. Chief Justice Burger. On April 9, 1973, Respondents requested an extension of time within which to file a brief in opposition to the petition. By action of the Clerk of this Court on April 11, 1973, the request was granted and the time extended to and including May 23, 1973.

STATEMENT

The Petition before this Court is solely and specifically concerned with the propriety of the District Court's award of the Petitioners' fees, costs and expenses in the amount of \$56,419.65 for the period of approximately 11 months from March 10, 1970 to January 29, 1971, in the Richmond school desegregation case¹ (53 F.R.D. 42, A. 29; 472 F.2d 320, A. 35).

On March 10, 1970, the Petitioners filed a motion for further relief in the case to which was appended an application for an award of reasonable attorneys' fees to be paid by the Richmond School Board. After approving, on an interim basis, the School Board's Plan for the desegregation of city schools for 1970-71,² the District Court on Jan-

¹ As Petitioners have pointed out (Pet. 4-5), this matter concerns only that litigation which pertained to schools, pupil reassignments, and transportation within the City of Richmond; accordingly, the later aspects of the case involving metropolitan relief which are currently before this Court in Nos. 72-549 and 72-550 are not here involved.

² *Bradley v. School Bd. of City of Richmond*, 317 F.Supp. 555 (E.D. Va. 1970).

uary 29, 1971, denied Petitioners' request for mid-year implementation of a more extensive desegregation plan.³ Following its acceptance of another School Board plan for the 1971-72 session,⁴ the District Court entered its opinion and judgment ordering the School Board to pay the award in question (53 F.R.D. 28; A. 1-33).

At the time of District Court's opinion, the established standard under which a court in the exercise of its equitable discretion could award counsel fees in school desegregation cases required findings of an "extraordinary" situation where a defendant school authority had persisted in a continuing pattern of "unreasonable, obdurate obstinacy" or defiance of the law.⁵

The District Court based its decree both on findings that the School Board had indeed exhibited the required obduracy in the face of clear legal demands (53 F.R.D. 30-33, 39-41; A. 1-9, 21-25), and, as an alternative ground, that "by reason of the unique character of school desegregation suits, justice require[d] that fees should be awarded" (53 F.R.D. 30, 41-42; A. 1-2, 25-28).

In reversing the lower Court's order, however, the Court of Appeals found that neither ground sustained the award (472 F.2d 320; A. 35) since the District Court's finding

³ Bradley v. School Bd. of City of Richmond, 324 F.Supp. 456, 457-61 (E.D. Va. 1971).

⁴ Bradley v. School Bd. of City of Richmond, 325 F.Supp. 828 (E.D. Va. 1971).

⁵ Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 321 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965); Bell v. School Bd. of Powhatan County, 321 F.2d 494, 500 (4th Cir. 1963). Other courts of appeals were likewise applying the standard first expressed by the Fourth Circuit. *E.g.*, Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); Rolfe v. County Bd. of Educ., 391 F.2d 77, 81 (6th Cir. 1968); Kemp v. Beasley, 352 F.2d 14, 23 (8th Cir. 1965).

of "obdurate obstinacy" was erroneous in that it was not supported by the record (472 F.2d 320-27; A. 36-51), and that since the authorization of such awards as a means of implementing public policy was a matter for legislative rather than judicial discretion (472 F.2d 328-31; A. 53-60), the lower Court had further erred in not adhering to the traditional equitable standard which the Appeals Court had been applying for nearly a decade (472 F.2d 331; A. 60).

After the Court of Appeals had reached the foregoing conclusions but before it had issued its opinion (472 F.2d 331; A. 60), Congress enacted Section 718 of the Education Amendments Act of 1972⁶ (Pet. 3), which expressly authorizes awards of reasonable attorneys' fees in school desegregation cases under enumerated conditions. Under the terms of this Act, Section 718 became effective on July 1, 1972.⁷

The Petitioners promptly alerted the Court of Appeals as to the existence of Section 718 and urged that it authorize the award made by the lower Court for services rendered prior to the effective date of the new statute (472 F.2d 331; A. 60-61). The Appeals Court withheld the opinion it had previously prepared in this case and conducted an *en banc* hearing to determine the applicability of Section

⁶ Pub. L. No. 92-318, 86 Stat. 235. Section 718 is a part of the "Emergency School Aid Act" which comprises Title VII of the Education Amendments Act of 1972 and which is codified at 20 U.S.C.A. §§ 1601-1619 (Cum. Supp. 1973). See also, 1 U.S. CODE CONG. & AD. NEWS 278, 421-42 (92d Cong. 2d Sess. 1972).

⁷ Under the "general provisions" portion of the Education Amendments Act of 1972, Section 2(c)(1) provides in part as follows: "Unless otherwise specified, each provision of this Act and each amendment made by this Act shall be effective after June 30, 1972" See 1 U.S. CODE CONG. & AD. NEWS *supra* at 279.

718 in this as well as in other cases then before it⁸ (472 F.2d 331; A. 60-61). Questions pertaining to the applicability of Section 718 were thoroughly briefed including a specific consideration of its legislative history to ascertain if retroactive operation might have been intended by Congress.

Following full arguments, the Court of Appeals concluded its opinion in this case by holding that Section 718 by its own terms was inapplicable in the first instance⁹ (472 F.2d 331-32; A. 61-62) and even if applicable, it did not reach legal services rendered prior to its effective date (472 F.2d 331; A. 61).¹⁰

ARGUMENT

The Respondents respectfully submit that this case presents no special or important reason for review by this Court.

In setting aside the award of attorneys' fees for the period from March, 1970 through January, 1971, the Court of Appeals correctly applied the traditional equitable standard which has been uniformly adhered to in determining the propriety of such awards in school desegregation cases. With respect to its application of this established rule to legal services rendered prior to July 1, 1972, the Appeals Court's decision conflicts neither with that of any other

⁸ See *Thompson v. School Bd. of City of Newport News*, 472 F.2d 177 (4th Cir. 1972) (Per Curiam) and companion cases (A. 78-81).

⁹ The Appeals Court reasoned that "there was no 'final order' pending unresolved on appeal" when Section 718 became effective and that Section 718 could not therefore be applied irrespective of *when* the legal services in question were rendered (472 F.2d 331-32; A. 61-62).

¹⁰ See *Thompson v. School Bd. of City of Newport News*, 472 F.2d 177, 178 (4th Cir. 1972) (Per Curiam) (A. 79-80).

court of appeals nor with applicable decisions of this Court.

Any necessity for a different standard governing awards of counsel fees in school desegregation cases has been adequately fulfilled by the Congressional enactment of Section 718 of the Education Amendments Act of 1972 encompassing all legal services rendered subsequent to July 1, 1972. The Court of Appeals properly found this legislatively conceived standard inapplicable to the services performed below.

Thus, there is no significant federal question in this case requiring this Court's resolution.

I.

The Decision Below Reflects An Adherence To The Standard Which Has Been Uniformly Applied For Nearly A Decade By All Courts Of Appeals Which Have Considered Awards Of Attorneys' Fees In School Desegregation Cases.

The standard applied by the Court of Appeals in reversing the award in question has such a deeply rooted precedential basis that Petitioners are loth to give it any serious discussion. At the outset of its opinion the Appeals Court expressed this rule in the following terms:

This Court has repeatedly declared that only in "the extraordinary case" where it has been "found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy or persistent defiance of law," would a court, in the exercise of its equitable powers, award attorney's fees in school desegregation cases.

(472 F.2d 320; A. 35) (citation omitted). This was perhaps an exercise in understatement, however, since the rule was first enunciated in this same Circuit nearly ten years

ago,¹¹ later enlarged upon in 1965,¹² and has been consistently applied to date.¹³

Of even greater significance, however, this governing standard for the award of counsel fees in school desegregation cases which first evolved in the Fourth Circuit has been adopted and uniformly applied to date by Courts of Appeals for the Fifth,¹⁴ Sixth,¹⁵ Eighth¹⁶ and Ninth¹⁷ Circuits, the

¹¹ *Bell v. School Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963).

¹² *Bradley v. School Bd. of City of Richmond*, 345 F.2d 310, 321 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965).

¹³ *E.g.*, *Bradley v. School Bd. of City of Richmond*, 472 F.2d 318, 320 (4th Cir. 1972) (A. 34, 35-36); *Brewer v. School Bd. of City of Norfolk*, 456 F.2d 943, 949-51 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972); *Walker v. County School Bd. of Brunswick*, 413 F.2d 53, 54 (4th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); *Felder v. Harnett County Bd. of Educ.*, 409 F.2d 1070, 1075 (4th Cir. 1969).

¹⁴ *E.g.*, *Johnson v. Combs*, 471 F.2d 84, 85, 87 (5th Cir. 1972), *rehearing and rehearing en banc denied*, 472 F.2d 1405 (5th Cir. 1973); *Horton v. Lawrence County Bd. of Educ.*, 449 F.2d 793, 794 (5th Cir. 1971) (cited by Petitioners at p. 5); *Williams v. Kimbrough*, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

¹⁵ *E.g.*, *Monroe v. Board of Comm'rs. of City of Jackson*, 453 F.2d 259, 263 (6th Cir.), *cert. denied*, 406 U.S. 945 (1972) (cited by Petitioners at p. 5); *Rolfe v. County Bd. of Educ.*, 391 F.2d 77, 81 (6th Cir. 1968); *Hill v. Franklin County Bd. of Educ.*, 390 F.2d 583, 585 (6th Cir. 1968).

¹⁶ *Walton v. Nashville, Ark. Special School Dist. No. 1*, 401 F.2d 137, 145 (8th Cir. 1968); *Jackson v. Marvell School Dist. No. 22*, 389 F.2d 740, 747 (8th Cir. 1968); *Clark v. Board of Educ. of Little Rock School Dist.*, 369 F.2d 661, 670-71 (8th Cir. 1966); *Kemp v. Beasley*, 352 F.2d 14, 23 (8th Cir. 1965); *Rogers v. Paul*, 345 F.2d 117, 125-26 (8th Cir.), *vacated and remanded on other grounds*, 382 U.S. 198 (1965). In *Clark v. Board of Education of Little Rock School District*, 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) (cited by Petitioners at p. 5), the Eighth Circuit awarded attorneys' fees for services performed in connection with the appeal only. *Id.* at 499. Nevertheless, in view of its earlier findings in the

only appellate courts which have had occasion to consider this precise question.

As was noted at p. 3 *supra*, the District Court applied this traditional standard, but the Court of Appeals reversed holding simply that the record failed to support the lower Court's findings that the School Board had exhibited that pattern of condemnable conduct which sustained an award of counsel fees.

The elaborate suggestion advanced by the Petitioners (Pet. 5-16) that this action on the part of the Court of Appeals is tantamount to an approval of a "rule" in the Fourth Circuit that school authorities are under no affirmative obligation to disestablish dual school systems (Pet. 13-16) serves merely to introduce non-issues and to obscure the controlling nature of the precedent upon which the decision below is based. No fair reading of the Appeals Court's opinion admits of such a characterization. The application of long-settled law in this case in a manner which fully comports with the decisions of every court of appeals which has considered the same question presents no occasion for this Court's review.

same case of "obstinate, adamant, and open resistance to the law" *Id.* 369 F.2d at 671, the reasonable implication is that the Eighth Circuit fully adhered to the traditional standard in approving an award for appellate services. The fact that the same Court denied attorneys' fees in a school desegregation case decided the same day as *Clark, Davis v. Board of Education of North Little Rock School District*, 449 F.2d 500, 502 (8th Cir. 1971) (Per Curiam), effectively negates any suggestion that the Eighth Circuit has departed from the traditional standard.

¹⁷ *Kelly v. Guinn*, 456 F.2d 100, 111 (9th Cir. 1972) (cited by Petitioners at p. 5).

II.

The Congressional Enactment Of Section 718 Renders Moot Any Issue Concerning The Need For An Additional Federal Standard Governing Awards Of Attorneys' Fees In School Desegregation Cases And Further Judicial Intervention In This Area Is Both Unnecessary And Inappropriate.

Perhaps in recognition that the record would not fully support an award of attorneys' fees against the School Board under the traditional equitable standard delineated at pp. 3, 6 *supra*, the District Court predicated its ruling on an alternative ground, i.e., "that in 1970 and 1971 the character of school desegregation litigation ha[d] become such that full and appropriate relief must [have] include[d] the award of expenses of litigation" (53 F.R.D. 41; A. 25). The Court of Appeals rejected this ground, however, finding that it was essentially "a means of implementing public policy" (472 F.2d 328; A. 53) and that since such authorizations were matters for legislative rather than judicial action (472 F.2d 328, 330-31; A. 53-54, 59, 60), the award of counsel fees in school desegregation cases was to be governed solely by the traditional standard (472 F.2d 331; A. 60).

The significant, indeed controlling, factor surrounding the Court of Appeals' reluctance to broaden the scope of counsel fee awards through judicial fiat is that the very congressional authorization it found as lacking vis-a-vis the period of time involved in this case became a reality with the passage of Section 718 of the Education Amendments Act of 1972. This explicit statutory allowance for awards of attorneys' fees to prevailing parties in school desegregation cases is, under the unanimous view of the

Appeals Court, now fully applicable to any such cases pending before it.¹⁸

¹⁸ *Thompson v. School Bd. of City of Newport News*, 472 F.2d 177, 178 (4th Cir. 1972) (Per Curiam) (A. 79).

As was noted previously at pp. 4, 5 *supra*, a number of issues concerning the applicability of Section 718 were raised, briefed and argued in this case. The Court of Appeals, although it clearly considered Section 718 as it pertained to this case, found that the construction urged by the Petitioners, *i.e.*, that "final order" embraced any appealable order dealing with any issue raised in a school desegregation case, was improper since there was no "final order" entered as "necessary to secure compliance" which was pending unresolved on appeal at the time Section 718 became effective (472 F.2d 331-32; A. 60-62). Thus, as far as Section 718 affected this case, the Appeals Court found that by *its own terms* it was inapplicable. Even if the terms of Section 718 had been satisfied, however, the award here would not have been validated since the Court in applying familiar legal principles ruled in *Thompson* that only legal services rendered *after* the effective date of Section 718 were compensable under it (472 F.2d 178; A. 79-80). On this latter point, the only other court which has considered the precise question, the United States Court of Appeals for the Fifth Circuit, has likewise declined to apply Section 718 retroactively. *Johnson v. Combs*, 471 F.2d 84, 86-87 (5th Cir. 1972), *rehearing and rehearing en banc denied*, 472 F.2d 1405 (5th Cir. 1973).

The Petitioners nevertheless argue that the decision below conflicts with that of this Court in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), to the effect that an appellate court must apply the law in effect at the time it renders its decision. *Id.* 281. The gist of Petitioners' contentions (Pet. 34) is that *Thorpe* required the Court of Appeals to apply Section 718 regardless of whether or not this case came within the specific terms of the statute itself (the Court found it did not—472 F.2d 331-32; A. 61-62) and regardless of whether or not Congress clearly intended it to be applied retroactively (the Court found no such intention—472 F.2d 178; A. 79-80).

The effect of Petitioners' argument is that *Thorpe* requires application of newly enacted legislation to cases pending in appeals courts *irrespective of legislative intent*, and that its rationale supplants the cardinal rule of legislative construction, *i.e.*, that a statute is presumed to operate prospectively absent a clearly expressed legislative intention to the contrary. *E.g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964) *citing* *Union Pac. R. Co. v. Laramie Stockyards Co.*, 231 U.S. 190, 199 (1913). Neither the circumstances of *Thorpe* nor rationale expressed therein, nor indeed, anything contained in its genesis, *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801), reasonably suggests any such drastic import.

Ignoring the existence of this statute under which a *more* uniform nationwide standard governing the award of attorneys' fees in school desegregation cases could not be imagined, the Petitioners contend that the decision below merits review because of a need for this Court to "establish a uniform Federal rule" concerning attorneys' fees for "private attorneys general" who sue to enforce important Congressional or Constitutional policies (Pet. 16-27). As the argument goes, because the Court of Appeals rejected this "private attorneys general" theory as a basis for the award below whereas it has been applied by other courts *in other types of litigation not involving school desegregation*, a conflict has arisen which compels resolution in this Court.

It is respectfully submitted that any conflict in this area is more imaginary than real. The Petitioners are unable to report any decision, other than that of the District Court below, wherein an award of attorneys' fees in a school desegregation case has been based on the suggested private attorneys general standard. Indeed the only conflict has been between the District Court and the Court of Appeals in this case.¹⁹ Such circumstances clearly present no occasion for this Court's review.

More properly, the Petitioners' argument (Pet. 16-27) suggests that owing to the lateness of the date, plaintiffs seeking the vindication of constitutional rights who are forced into court by defiant school authorities should no longer be required to bear the expenses of such litigation; accordingly, the private attorneys general standard for

¹⁹ In fact, the United States Court of Appeals for the Fifth Circuit has agreed with the Fourth Circuit in specifically rejecting this standard as applicable in school desegregation cases. *Johnson v. Combs*, 471 F.2d 84, 87 (5th Cir. 1972), *rehearing and rehearing en banc denied*, 472 F.2d 1405 (5th Cir. 1973).

counsel fee awards should be extended to school desegregation litigation through the establishment of a new judicially created rule. While the School Board has never questioned the philosophical basis for such a new standard and is in agreement with much of the rationale underlying its advancement, the Congressional enactment of Section 718 has now afforded plaintiffs throughout the nation with measures which should be fully adequate in preventing "recalcitrant state officials" from forcing "unwilling victims of illegal discrimination" in public education "to bear the constant and crushing expense of enforcing their constitutionally accorded rights" (Pet. 15).

Since Congress has now enacted a uniform standard governing awards of attorneys' fees in school desegregation cases which has effectively disposed of any necessity for a judicially created federal rule in this area, further judicial intervention clearly would be inappropriate and no important federal question remains for this Court's resolution.²⁰

CONCLUSION

Since the decision below is in all respects consistent with both applicable rulings of this Court and with other courts of appeals as well, and the need for any uniform federal rule governing awards of counsel fees in school desegregation cases was eliminated with the enactment of Section 718,

²⁰ The Petitioners also urge that the decision below conflicts with decisions of this Court and other courts of appeals in that it was predicated on a requirement that benefits to the class represented must have been pecuniary in nature (Pet. 28-32). The basis for this argument is unclear at best. Neither the District Court nor the Court of Appeals utilized this "class benefit" theory as a basis for the respective holdings. Even though the theory does appear in an earlier opinion of the Court of Appeals in *Brewer v. School Board of City of Norfolk*, 456 F.2d 943, 951-52 (4th Cir.), cert. denied, 406 U.S. 933 (1972), it is no part of this case.

no basis for this Court's review has been demonstrated. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1322

SUPREME COURT
FILE

MAY 23

MICHAEL RODAK

CAROLYN BRADLEY, *et al.*,

Petitioners,

—v.—

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW AS *AMICUS CURIAE*
IN SUPPORT OF THE PETITION FOR
WRIT OF CERTIORARI**

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IN THE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW AS *AMICUS CURIAE*
IN SUPPORT OF THE PETITION FOR
WRIT OF CERTIORARI**

Pursuant to Rule 42(2) of the Rules of this Court, the Lawyers' Committee for Civil Rights Under Law has requested and received the consent of the parties to this action to its filing a brief as *amicus curiae* in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

INTEREST OF THE *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a nonprofit corporation which was organized at the request of President Kennedy to involve private lawyers throughout the nation in the struggle to assure equal civil rights for all Americans. The Committee's membership includes two former Attorneys General, twelve past Presidents of the American Bar Association, and a number of law school deans, as well as many of the nation's leading attorneys. Through its national office and its offices in Jackson, Mississippi and twelve other cities, the Lawyers' Committee has actively engaged the services of over a thousand members of the private bar in addressing legal problems in such areas as voting, education, employment, housing, and the administration of justice. The *amicus* has long been concerned about awards of attorneys' fees as an element of appropriate relief in actions affecting the rights of poor people and members of minority groups.

INTRODUCTION

This case involves one phase of the litigation concerning the desegregation of the Richmond public schools. The district court, as an element of relief granted to the successful plaintiffs, awarded attorneys' fees and taxed them against the defendant school board as part of costs. The Court of Appeals for the Fourth Circuit reversed, holding that the district court was powerless to make such an award.

The *amicus* believes that this is the first civil rights case ever in which an award of attorneys' fees by a district court has been reversed by a court of appeals. It is a case

in which there are several well established justifications for awarding fees and in which a district court has awarded fees in accordance with its duty to fashion effective and appropriate relief. It is a case in which a court of appeals has denied that equity courts have the authority to go beyond explicit statutory remedies and award attorneys' fees, even when an award of fees is necessary to effectuate strong constitutional and statutory policies and to do justice under the circumstances.

QUESTIONS PRESENTED

1. Whether courts are prohibited from awarding attorneys' fees to successful plaintiffs in equitable actions where the defendant is an entity whose resources are held for the benefit of a class and the action confers a substantial non-pecuniary benefit on the class.

2. Whether, in the absence of explicit statutory authorization, courts are prohibited from awarding attorneys' fees to successful plaintiffs in actions which effectuate strong constitutional and statutory policies largely dependent on private litigation for their enforcement.

ARGUMENT

The decision of the Fourth Circuit in this case conflicts with numerous decisions of this Court and other courts of appeals, challenges fundamental principles of equity, and would effectively nullify important constitutional and statutory policies by stripping them of an effective means of enforcement. The court's opinion is broad in scope and would severely restrict the exercise of equity powers in

civil rights cases, labor cases, securities cases, environmental cases, consumer cases, and many other kinds of cases in which remedies not specifically set forth in statutes may be appropriate.

Decisions of this Court and other federal courts have stated two distinct grounds for equitable awards of attorneys' fees to successful plaintiffs in cases not involving contracts for the payment of attorneys' fees, statutes specifically authorizing awards of fees,¹ or improper conduct on the part of a litigant.² They can be called the "class benefit rationale" and the "full-and-appropriate-relief rationale." These two rationales are distinct, although their spheres of application overlap to some extent.

The class benefit rationale

The class benefit rationale originated in *Trustees v. Greenough*, a class action on behalf of bondholders against trustees of a fund which was pledged as security for their bonds. 105 U.S. 527 (1882). Plaintiff in that case alleged that the fund was being wasted and sought relief to pre-

¹ The petition for certiorari argues that a statutory provision for awarding attorneys' fees, Section 718 of the Emergency School Aid Act of 1972, is applicable to the instant case. Although the *amicus* agrees with this position, it wishes to focus on other aspects of the court of appeals' decision because it is primarily concerned about what it regards as even more fundamental and far-reaching errors which go to the very heart of the equity powers of the federal courts.

² The district court found, and petitioners maintain, that attorneys' fees were warranted, *inter alia*, because of defendants' obdurate obstinacy in the instant litigation. The court of appeals overturned the district court's finding of fact on this issue. The *amicus* is of the opinion that, in overturning the finding of the district court, the court of appeals exceeded the proper scope of appellate review and employed an incorrect standard for school boards' responsibility to desegregate public schools. For the reason indicated in note 1 above, however, the *amicus* does not wish to discuss these points, which are fully covered in the petition itself.

serve the fund as security for the bonds. This Court held that attorneys' fees should be awarded to the successful plaintiff on the following grounds:

"It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee-bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution." *Id.* at 532.

In *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), this Court reaffirmed the rule of *Trustees* and extended it to cover cases which were not formally class actions, but which achieved results benefiting a class:

"Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power

of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." *Id.* at 166-7.

The awards of attorneys' fees to plaintiffs in *Trustees* and *Sprague* were not punitive and were not based on any wrongdoing on the part of defendants. Moreover, in practical effect, those awards were not true shifts of costs from one party-in-interest to another. The awarding of counsel fees out of funds produced or conserved by the actions was merely a device for preventing unjust enrichment by distributing the costs of litigation among its beneficiaries.

Mills v. Electric Auto-Lite, 396 U.S. 375 (1970), was a stockholders' derivative action under the Securities Exchange Act of 1934 alleging that the corporation had obtained stockholders' approval for a merger by means of a misleading proxy solicitation. Plaintiffs prevailed on the merits, and this Court held that the therapeutic service of bringing the corporation into compliance with the securities laws was a substantial benefit to the class of shareholders and warranted distributing the costs of the action over all the shareholders by taxing those costs against the defendant corporation. *Mills* extended the principles of *Trustees* and *Sprague* in two ways: *First*, it imposed the successful plaintiffs' legal costs directly upon the defendant, rather than on a fund held by the defendant, because the defendant's entire treasury was held for the benefit of the class benefitting from the action. *Second*, it specifically held that the class benefit rationale was not limited to cases involving the

creation or preservation of a pecuniary fund and extended to actions conferring non-pecuniary benefits as well:

"The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses." *Id.* at 392.

Mills was followed by the Court of Appeals for the D. C. Circuit in *Yablonski v. United Mine Workers of America*, 466 F.2d 424 (D.C. Cir. 1972), *petition for cert. filed*, 41 U.S.L.W. 3350 (U.S. Nov. 1, 1972). In that case, which was not a class action, plaintiffs sued the union of which they were members for violations of LMRDA in connection with Yablonski's election bid for the presidency of the union. The district court denied plaintiffs' motion for attorneys' fees on the ground that the primary motive of the lawsuits was to facilitate Yablonski's candidacy, not to benefit the union. Reversing the denial of fees and rejecting this subjective standard, the court of appeals held that "The relevant question is whether or not the trouble he takes results in the actual conferring of benefits on others than himself." *Id.* at 431. The court of appeals also rejected the proposition that, in order to justify awarding attorneys' fees, the benefit to the class must be pecuniary:

"The Supreme Court made clear in *Mills* that the judicial power to award counsel fees does not depend upon the

creation by the litigation in question of a fund from which such fees can be paid nor upon whether the benefit conferred is pecuniary in nature." *Id.* at 431, n. 10.

In *Hall v. Cole*, No. 72-630 (U.S., May 21, 1973), a case similar to *Yablonski*, this Court again approved the class benefit rationale and again applied it to a case in which the benefit conferred was therapeutic rather than pecuniary.

One of the grounds on which petitioners in the instant case seek an award of attorneys' fees is that their action benefited the same children, parents and citizens of Richmond for whose benefit the resources of the respondent Richmond school board are held. They argue that the taxing of attorneys' fees against the school board would serve to distribute the cost of the litigation over the class benefiting from it. The Court of Appeals for the Fourth Circuit acknowledged that *Mills* called for taxing attorneys' fees against defendants in cases where the defendant's resources are held for the benefit of the same class that benefits from the action (Pet. App. pp. 55a-58a). But the court would not apply the class benefit rationale to this case—presumably because the benefit conferred here was not "pecuniary."³ The Fourth Circuit's requirement of a pe-

³ The court of appeals opinion did not explicitly consider the application of the class benefit rationale to this case. However, the Fourth Circuit's opinion in *Brewer v. School Board of the City of Norfolk*, 456 F.2d 943 (4th Cir. 1972) (which was handed down a few months before its opinion in this case and was also written by Judge Russell) clearly states that court's requirement that a benefit be *pecuniary* in order to warrant the application of the class benefit rationale. *Id.* at 951-52. The only difference between *Brewer* and the instant case as far as the issue of attorneys' fees is concerned is that the benefit in *Brewer*—free transportation—could be characterized as being "pecuniary," whereas the benefit here—desegregation—is less susceptible to monetary evaluation. The Fourth Circuit granted attorneys' fees in *Brewer* and denied them here, thereby implicitly invoking its requirement of a pecuniary benefit.

cuniary benefit for the application of the class benefit rationale conflicts with the decisions of this Court in *Mills* and *Hall* and the decision of the D.C. Circuit in *Yablonski*.

The Full-and-Appropriate-Relief Rationale

Numerous decisions of this Court have held generally that where a right has been created by the Constitution or by statute, courts should exercise their equity powers to fashion relief that will be effective in enforcing that right and appropriate under the circumstances of the case. *Bell v. Hood*, 327 U.S. 678 (1946); *Deckert v. Independence Corp.*, 311 U.S. 282 (1940); *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944); *Porter v. Warner Co.*, 328 U.S. 395 (1946); *Swann v. Board of Education*, 402 U.S. 1 (1971); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

“... [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” *Bell v. Hood*, 327 U.S. at 684.

“... [W]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, ‘there is inherent in the Courts of

Equity a jurisdiction to . . . give effect to the policy of the legislature.' *Clark v. Smith*, 13 Pet. 195, 203." *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 291-292 (1960).

Moreover, this Court held in *Virginian Ry. v. System Federation* that those equitable powers assume an even broader and more flexible character when the public interest, and not just a private controversy, is at stake. 300 U.S. 515 (1937).

In applying these general principles, this Court and other courts of appeals have held specifically that, where a Constitutional or statutory right is largely dependent on private litigation for its enforcement, courts should award attorneys' fees to successful plaintiffs in appropriate cases in order to prevent that right from becoming meaningless for lack of enforcement. *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Mills v. Electric Auto-Lite*, *supra*; *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972); *Gartner v. Soloner*, 384 F.2d 348 (3rd Cir. 1967); *Johnson v. Nelson*, 325 F.2d 646 (8th Cir. 1963); *Cole v. Hall*, 462 F.2d 777 (2d Cir. 1972), *aff'd*, No. 72-630 (U.S., May 21, 1973).

"Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. . . . Counsel fees in cases of this kind are not only appropriate, they are imperative to preserve the Congressional purpose. . . . Without counsel fees the grant of federal jurisdiction is but a gesture" *Cole v. Hall*, 462 F.2d 777, 780-81.

This doctrine is especially applicable where, as in the instant case, the litigation costs are high, the plaintiffs are poor, and the relief sought is injunctive. See *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972).

In reversing the district court's award in the case at bar, the Fourth Circuit held that, in the absence of explicit statutory authorization, courts are not permitted to award attorneys' fees as a means of providing effective enforcement for Constitutional or statutory public policy:

"If, however, an award of attorneys' fees is to be made as a means of implementing public policy, as the District Court indicates in its exposition of its alternative ground of award, it must normally find its warrant for such action in statutory authority." (Pet. App. pp. 53a-54a)

"We find ourselves in agreement with the conclusion that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts." (Pet. App. p. 59a)

This holding is completely at odds with decisions of this Court as to when equitable awards may be granted:

"... the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Co.*, 328 U.S. 395, 398 (1946).

It is true that this Court held in *Fleischman Corp. v. Maier Brewing Co.*, a case under the Lanham Act, that a clear Congressional intent to preclude awards of attorneys' fees in a certain area of law must be respected by the courts. 386 U.S. 714 (1967). However, in *Mills* this Court limited the *Fleischmann* holding to situations in which Congress had clearly "marked the boundaries of the power to award monetary relief" by providing a "meticulously detailed" pattern of statutory remedies. 396 U.S. at 391. It is one thing to say that the specific terms of a statute, its legislative history, or a "meticulously detailed" pattern of remedies may indicate a Congressional intent to prohibit awards of attorneys' fees. But it is something else to assert, as the court of appeals did in the instant case, that "when Congress omits to provide specially for the allowance of attorney's fees in a statutory scheme designed to further a public policy, it may be fairly accepted that it did so purposefully. . . ." (Pet. App. p. 58a)

42 U.S.C. § 1983 is a broad provision designed to create a general right of action to protect rights guaranteed by the Fourteenth Amendment. Its legislative history does not indicate a Congressional intent to preclude equitable awards of attorneys' fees.⁴ Unlike the sections of the Lanham

⁴ If there can be any inference at all about what specific remedies Congress envisioned when it passed 42 U.S.C. § 1983, it would be that awards of attorneys' fees were contemplated. Section 1983 was originally section 1 of the Act of April 20, 1871, 17 Stat. 13. The original version of that section, after creating a cause of action, provided as follows:

" . . . such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in

Act considered in *Fleischmann*, it is not part of a "meticulously detailed" pattern of remedies indicating a clear Congressional intent to preclude awards of fees. Furthermore, it cannot be maintained that provisions for attorneys' fees in sections of the Civil Rights Act of 1964 evince a Congressional intent to disallow awards of fees in suits under 42 U.S.C. § 1983. Congressional actions in 1964 are not

their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases."

This was a clear direction to search as widely as possible for effective remedies, and especially to search among other remedies created by Congress in other civil rights laws. This command is reinforced by the reference to the Act of April 9, 1866 (14 Stat. 27), because the 1866 statute was largely concerned with seeking effective remedies. In following Congress' directions to seek remedies from among its own civil rights laws, one need look no further than a law passed 11 months earlier, the Act of May 31, 1870. 16 Stat. 140. This statute, designed to protect the right to vote, created civil causes of action in §§ 2, 3 and 4 and provided that offenders should

"forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the decision of the court."

The relationship of the Act of May 31, 1870, to the other civil rights statutes is further strengthened by the fact that § 16 of the Act of May 31, 1870, re-enacted a portion of § 1 of the Act of April 9, 1866 (now codified as 42 U.S.C. § 1981), and § 18 of the Act of May 31, 1870, explicitly re-enacted the entire Act of April 9, 1866.

Thus when Congress passed its statute on April 20, 1871, directing the courts to apply "other remedies provided in like cases" and "the other remedial laws of the United States which are in their nature applicable in such cases", it must have contemplated that one such remedy might be provision for counsel fees, which it had explicitly authorized in a civil rights law passed only 11 months before.

relevant to determining the intent of Congress in 1871, and the notion that statutory provisions for attorneys' fees in certain kinds of cases imply an intent to disallow awards of fees in other, similiar kinds of cases was rejected by this Court in *Mills* (396 U.S. at 390-91) and *Hall* (No. 72-630, pp. 9-10).

Conclusion

Plaintiffs are impecunious school children. They have successfully litigated an action which has benefited not only black school children, but white school children, parents and other citizens of Richmond. The beneficiaries of the action are the very class for whose benefit the resources of the Richmond school board are supposed to be used.⁵ The action has enforced one of our most fundamental Constitutional and statutory policies—the right to equality in educational opportunity. The action arose in a statutory context in which private suits are an important means of enforcement. Moreover, as the district court said,

“ . . . this sort of case is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial . . . necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes.” (Pet. App. p. 24a).

⁵ The school board has expended a substantial sum in defending this action. It would be ironic indeed for the taxpayers to pay for opposition to desegregation required by law and for private parties to bear the burden of bringing the school district into compliance with the law.

When either the class benefit rationale or the full-and-appropriate-relief rationale is applicable, a court of equity should grant attorneys' fees to a successful private plaintiff, except where there is a clear Congressional intent to preclude such an award. In this case both the class benefit rationale and the full-and-appropriate-relief rationale apply, and there are no indications of a Congressional intent to preclude awards of fees. The district court, with its first-hand knowledge of the particular circumstances of this case, believed that attorneys' fees were necessary to provide "full and appropriate relief."

The court of appeals based its reversal of the district court's award on two grounds. One was explicit: Courts may not grant attorneys' fees on the basis of the full-and-appropriate-relief rationale without specific statutory authorization. The other was implicit: The class benefit rationale for awarding attorneys' fees does not apply unless the benefit to the class is pecuniary. Both these propositions are at odds with decisions of this Court and other courts of appeals.

The decision of the Fourth Circuit strikes at the heart of the equity powers of the courts. It would undermine a well established equitable device for preventing unjust enrichment, and it would restrict courts to a wooden application of explicit statutory remedies only. It would greatly impair the ability of the courts to deal fairly and flexibly with equitable claims and to provide effective protection for rights guaranteed by the Constitution and statutes of the United States.

For the foregoing reasons the petition for a writ of certiorari should be granted.

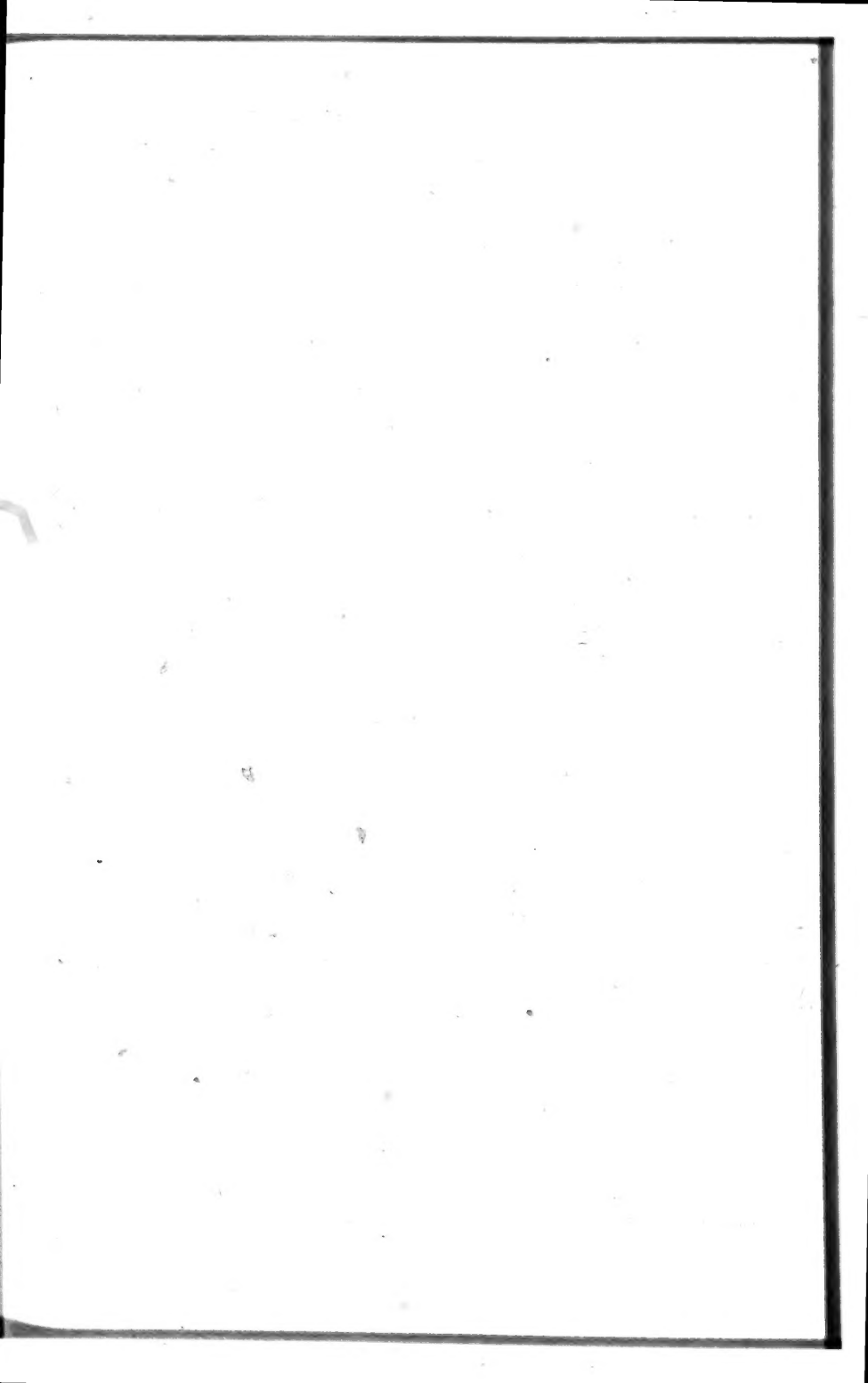
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Dated: May 21, 1973



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

—v.—

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS
CAROLYN BRADLEY, *ET AL.***

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Civil Rights Under Law

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**BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW AS *AMICUS CURIAE***

Pursuant to Rule 42(2) of the Rules of this Court, the Lawyers' Committee for Civil Rights Under Law has requested and received the consent of the parties to this action to its filing a brief as *amicus curiae*.

INTEREST OF THE *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a nonprofit corporation which was organized at the request of President Kennedy to involve private lawyers throughout the nation in the struggle to assure equal civil rights for all Americans. The Committee's membership includes two former Attorneys General, twelve past Presi-

dents of the American Bar Association, and a number of law school deans, as well as many of the nation's leading attorneys. Through its national office and its offices in Jackson, Mississippi and twelve other cities, the Lawyers' Committee has actively engaged the services of over a thousand members of the private bar in addressing legal problems in such areas as voting, education, employment, housing, and the administration of justice. The *amicus* has long been concerned about awards of attorneys' fees as an element of appropriate relief in actions affecting the rights of poor people and members of minority groups.

INTRODUCTION

This case involves one phase of the litigation concerning the desegregation of the Richmond public schools.¹ The District Court, as an element of relief granted to the successful plaintiffs, awarded attorneys' fees and taxed them against the defendant school board as part of costs (Pet. App. 113a). The Court of Appeals for the Fourth Circuit reversed, holding that the District Court was powerless to make such an award (Pet. App. 160a).

The *amicus* believes that this is the first civil rights case in which an award of attorneys' fees by a district court has been reversed by a court of appeals. It is a case in which there are several well-established justifications for awarding fees and in which a district court has awarded fees in accordance with its duty to fashion effective and

¹ This case does not involve orders of the District Court regarding Henrico and Chesterfield Counties which this Court considered in *Richmond School Board v. Virginia State Board of Education*, — U.S. —, 93 S. Ct. 1952 (1973), or attorneys' fees in connection therewith.

appropriate relief. It is a case in which a court of appeals has held that equity courts have no authority to go beyond explicit statutory remedies and award attorneys' fees, even when an award of fees is necessary to effectuate strong constitutional and statutory policies and to do justice under the circumstances.

QUESTIONS PRESENTED

1. Whether federal courts are prohibited from awarding attorneys' fees to successful plaintiffs in equitable actions where the defendant is an entity whose resources are held for the benefit of a class and the action confers a substantial nonpecuniary benefit on that class.

2. Whether, in the absence of explicit statutory authorization, federal courts are prohibited from awarding attorneys' fees to successful plaintiffs in actions which effectuate strong constitutional or statutory policies largely dependent on private litigation for their enforcement.

SUMMARY OF ARGUMENT

The District Court's award of attorneys' fees ought to be sustained on either or both of two well-established equitable grounds. *First*, the award should be sustained because this action benefitted the people of Richmond, Virginia—the class for the benefit of whom the resources of the defendant school board are supposed to be used. Thus, taxing attorneys' fees against defendants is an appropriate equitable device for spreading the costs of this action over the entire class benefitting from it, thereby preventing unjust enrichment. *Second*, the award should be

sustained because it was necessary for full and appropriate relief under the circumstances of this case. When a strong constitutional or statutory policy is largely dependent on private litigation for its enforcement, and when such litigation is undertaken by poor plaintiffs seeking injunctive relief, an award of attorneys' fees is appropriate to provide effective enforcement for the constitutional or statutory policy and to prevent fundamental rights from becoming meaningless for lack of enforcement.

In reversing the District Court's award, the Court of Appeals for the Fourth Circuit refused to apply the first of these rationales—the class benefit rationale—because it takes the position that this rationale is applicable only in cases where the benefit to the class is pecuniary or “quasi-pecuniary” in nature. This erroneous position is in direct conflict with numerous decisions of this Court and other courts of appeals. The Fourth Circuit rejected the second rationale—the full-and-appropriate-relief rationale—on the ground that attorneys' fees may not be awarded in order to provide effective enforcement for constitutional or statutory guarantees unless there is an explicit statutory provision authorizing such awards. This proposition is also in direct conflict with numerous holdings of this Court and other courts of appeals. If allowed to stand, it would undermine the ability of courts of equity to tailor remedies to fit the facts of individual cases and to fashion practical and effective relief. It is a challenge to one of the essential powers of courts of equity.

Where, as here, the two above-described equitable rationales are both present in one case, an award of fees is especially appropriate, and the Fourth Circuit erred in reversing the District Court's award of fees.

ARGUMENT

The decision of the Fourth Circuit in this case conflicts with numerous decisions of this Court and other courts of appeals, challenges fundamental principles of equity, and would effectively nullify important constitutional and statutory policies by stripping them of an effective means of enforcement. The Fourth Circuit's opinion is broad in scope and would severely restrict the exercise of equity powers in civil rights cases, labor cases, environmental cases, and many other kinds of cases in which remedies not specifically set forth in statutes may be appropriate.

Decisions of this Court and other federal courts have stated two grounds for equitable awards of attorneys' fees to successful plaintiffs in cases not involving contracts for the payment of attorneys' fees, statutes specifically authorizing awards of fees,² or improper conduct on the part of a litigant.³ They can be called the "class benefit rationale" and the "full-and-appropriate-relief rationale."

² The petitioners argue that a statutory provision for awarding attorneys' fees, Section 718 of the Emergency School Aid Act of 1972, is applicable to the instant case. Although we agree with this position, we wish to focus on other aspects of the Court of Appeals' decision because we are primarily concerned about what we regard as even more fundamental and far-reaching errors in that decision which go to the very heart of the equity powers of the federal courts.

³ The District Court found, and petitioners maintain, that attorneys' fees were warranted, *inter alia*, because of defendants' obdurate obstinacy in the instant litigation. The court of appeals overturned the district court's finding of fact on this issue. We submit that, in overturning the finding of the district court, the court of appeals exceeded the proper scope of appellate review and employed an incorrect standard for school boards' responsibility to desegregate public schools. For the reason indicated in note 1 above, however, we do not wish to discuss these points, which are being fully argued by the petitioners.

These two rationales are distinct, although their spheres of application overlap to some extent.

The class benefit rationale

The class benefit rationale originated in *Trustees v. Greenough*, 105 U.S. 527 (1882), and has been progressively developed by this Court in *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Hall v. Cole*, — U.S. —, 93 S. Ct. 1943 (1973).

Trustees v. Greenough was a class action on behalf of bondholders against trustees of a fund which was pledged as security for their bonds. Plaintiff in that case alleged that the fund was being wasted and sought to preserve it as security for the bonds. This Court held that attorneys' fees should be awarded to the successful plaintiff on the following grounds:

"It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee-bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution." 105 U.S. at 532.

In *Sprague v. Ticonic National Bank*, this Court reaffirmed the rule of *Trustees* and extended it to cover cases which were not formally class actions, but which achieved results benefiting a class:

"Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." 307 U.S. at 166-67.

The awards of attorneys' fees to plaintiffs in *Trustees* and *Sprague* were not punitive and were not based on any wrongdoing by defendants in the course of the litigation. The awarding of counsel fees out of funds produced or conserved by the actions was merely a device for preventing unjust enrichment by distributing the costs of litigation among its beneficiaries.

Mills v. Electric Auto-Lite was a stockholders' derivative action under the Securities Exchange Act of 1934 alleging that the corporation had obtained stockholders' approval for a merger by means of a misleading proxy solicitation. Plaintiffs prevailed on the merits, and this Court held

that the therapeutic service of bringing the corporation into compliance with the securities laws was a substantial benefit to the class of shareholders and warranted distributing the costs of the action over all the shareholders by taxing those costs against the defendant corporation. *Mills* extended the principles of *Trustees* and *Sprague* in two ways: *First*, it imposed the successful plaintiffs' legal costs directly upon the defendant, rather than on a fund held by the defendant, because the defendant's entire treasury was held for the benefit of the class benefiting from the action. *Second*, it specifically held that the class benefit rationale was not limited to cases involving the creation or preservation of a pecuniary fund and extended to actions conferring non-pecuniary benefits as well:

"The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses." 396 U.S. at 392.

Only last May, in *Hall v. Cole*, this Court approved the *Mills* Court's holding that the class benefit rationale extended "not only to litigation that confers a monetary benefit on others, but also to litigation " "which corrects or prevents an abuse which would be prejudicial to the rights and interests" " of those others," *id.* at — U.S. — n. 7, 93 S. Ct. 1946 n. 7. In *Hall*, the plaintiff had been expelled from

his union for criticism of the union's leadership. He sued union officials under the LMRDA, claiming that his expulsion violated his right of free speech. The District Court found that his rights had been violated, ordered him reinstated in the union, and awarded him attorneys' fees. The Second Circuit affirmed. This Court upheld the allowance of attorneys' fees and reaffirmed the principle that the class benefit rationale extended to cases involving non-pecuniary, "therapeutic" benefits such as the protection of freedom of speech. The District of Columbia Circuit reached a similar result in *Yablonski v. United Mine Workers of America*, 466 F.2d 424 (D. C. Cir. 1972), *cert. denied*, — U.S. —, 93 S. Ct. 2729 (1973).

The class benefit theory has most commonly been employed in cases like *Mills* and *Hall* where the defendants were private entities which held their resources for the benefit of some class and had fiduciary obligations toward that class. Courts have seen fit to tax attorneys' fees against such defendants in appropriate cases for two reasons. First, it would be unjust enrichment for other members of the class to benefit as "free riders" from the efforts and expenditures made by one plaintiff. Second, since many suits benefitting large classes involve relatively small injuries to each of many members of a class, and since the costs of litigating such suits may be substantial, as a practical matter, unless the burden of attorneys' fees is distributed over the entire class, the relief obtained by a single plaintiff might not be sufficient to warrant his bringing the action. Therefore, unless attorneys' fees were awarded in such cases, litigation to redress many widely dispersed injuries or injustices might be effectively foreclosed.

The underlying principles of the class benefit theory are especially applicable where, as in this case, the defendant is a governmental entity with fiduciary obligations to the public. See *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). The resources of the defendant school board are supposed to be used to provide lawful public education for the children of Richmond. Public education not only benefits the children of Richmond—by enriching their lives culturally and improving their economic opportunities; it also benefits the Richmond community as a whole—by contributing toward a more productive economy and a better educated citizenry. *Rice v. Commonwealth*, 188 Va. 224, 49 S.E. 2d 342 (1948).

Petitioners have compelled the defendant School Board to eliminate certain unlawful, discriminatory practices from the Richmond public school system. The residents of Richmond have benefitted from this vindication of Fourteenth Amendment rights, just as the defendant-corporation's stockholders benefitted from the protection of corporate suffrage in *Mills* and just as the defendant-union's members benefitted from the protection of freedom of speech in *Hall*.

In reversing the District Court's award of attorneys' fees, the Court of Appeals for the Fourth Circuit acknowledged that *Mills* called for taxing attorneys' fees against defendants in cases where the defendant's resources are held for the benefit of the same class that benefits from the action (Pet. App. 181a). But the court would not apply the class benefit rationale to this case—presumably because the benefit conferred here was not "pecuniary."⁴

⁴ The Fourth Circuit's opinion did not discuss the application of the class benefit rationale to this case. However, its opinion in *Brewer v. School Board of the City of Norfolk*, 456 F.2d 943 (4th

The Fourth Circuit's requirement of a pecuniary benefit for the application of the class benefit rationale is in direct conflict with the decisions of this Court in *Mills and Hall*, which explicitly approved the application of that rationale to actions conferring non-pecuniary, "therapeutic" benefits.

The Full-and-Appropriate-Relief Rationale

Numerous decisions of this Court have held generally that where a right has been created by the Constitution or by statute, courts should exercise their equity powers to fashion relief that will be effective in enforcing that right and appropriate under the circumstances of the case. *Swann v. Board of Education*, 402 U.S. 1 (1971); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Bell v. Hood*, 327 U.S. 678 (1946); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940).

"... [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal

Cir.), *cert. denied*, 406 U.S. 933 (1972) (which was handed down a few months before its opinion in this case and was written by the same judge) clearly states that court's requirement that a benefit be *pecuniary* in order to warrant the application of the class benefit rationale. *Id.* at 951-52. The only difference between *Brewer* and the instant case as far as the issue of attorneys' fees is concerned is that the benefit in *Brewer*—free transportation—could be characterized as being "pecuniary," whereas the benefit here—desegregation—is less susceptible to monetary evaluation. The Fourth Circuit granted attorneys' fees in *Brewer* and denied them here, thereby implicitly invoking its requirement of a pecuniary benefit.

statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. at 684.

"... [W]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.' *Clark v. Smith*, 13 Pet. 195, 203." *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960).

This Court held in *Virginian Ry. Co. v. System Federation No. 40, Railway Employees* that these equitable powers assume an even broader and more flexible character when the public interest, and not just a private controversy, is at stake. 300 U.S. 515 (1937).

In applying these general principles, this Court and several courts of appeals have held specifically that, where a Constitutional or statutory right is largely dependent on private litigation for its enforcement, courts should award attorneys' fees to successful plaintiffs in appropriate cases in order to prevent that right from becoming meaningless for lack of enforcement, *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, — U.S. —, 93 S. Ct. 1419 (1973); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971);

Gartner v. Soloner, 384 F.2d 348 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968); *Johnson v. Nelson*, 325 F.2d 646 (8th Cir. 1963); *Cole v. Hall*, 462 F.2d 777 (2d Cir. 1972), *aff'd sub nom. Hall v. Cole*, — U.S. —, 93 S. Ct. 1943 (1973). As Justice Clark stated in *Cole*,

"Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. . . . Counsel fees in cases of this kind are not only appropriate, they are imperative to preserve the Congressional purpose. . . . Without counsel fees the grant of federal jurisdiction is but a gesture" 462 F.2d at 780-81.

Although many public-spirited lawyers undertake *pro bono publico* legal activities, the number of nonpaying cases they can absorb is only a fraction of those that deserve to be litigated. Thus if the enforcement of public policy in certain areas is left up to private litigation and the prosecution of such litigation is made largely dependent on lawyers' charitable instincts, fundamental rights intended to be protected by law may be effectively extinguished for many people. As the District Court said,

"The private lawyer in such a case most accurately may be described as a 'private attorney general.' Whatever the conduct of defendants may have been, it is intolerably anomalous that counsel entrusted with guaranteeing the effectuation of a public policy of nondiscrimination as to a large proportion of citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof. The fulfillment of constitutional guarantees, when to do so profoundly alters a key social institution and

causes reverberations of untraceable extent throughout the community, is not a private matter." (Pet. App. 139a-40a.)

These considerations are particularly compelling where, as in the instant case, the litigation costs are high, the plaintiffs are poor, and the relief sought is injunctive. See *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *appeal docketed*, No. 73-1145, 9th Cir., Jan. 29, 1973.

In reversing the District Court's award in the case at bar, the Fourth Circuit held that, in the absence of explicit statutory authorization, courts are not permitted to award attorneys' fees as a means of providing effective enforcement for Constitutional or statutory public policy:

"If, however, an award of attorneys' fees is to be made as a means of implementing public policy, as the District Court indicates in its exposition of its alternative ground of award, it must normally find its warrant for such action in statutory authority." (Pet. App. 179a-80a.)

"We find ourselves in agreement with the conclusion that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts." (Pet. App. 185a.)

This holding is completely at odds with decisions of this Court as to when equitable awards may be granted:

"... the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and in-

escapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

It is true that this Court held in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), a Lanham Act case, that a clear Congressional intent to preclude awards of attorneys' fees in a certain area of law must be respected by the courts. However, in *Mills* this Court limited the *Fleischmann* holding to situations in which Congress had clearly "marked the boundaries of the power to award monetary relief" by providing a "meticulously detailed" pattern of statutory remedies. 396 U.S. at 391.

It is one thing to say that the specific terms of a statute, its legislative history, or a "meticulously detailed" pattern of remedies may indicate a Congressional intent to prohibit awards of attorneys' fees. But it is something else to assert, as the Court of Appeals did in the instant case, that "when Congress omits to provide specially for the allowance of attorney's fees in a statutory scheme designed to further a public policy, it may be fairly accepted that it did so purposefully. . . ." (Pet. App. 184a.)

In *Hall v. Cole*, *supra*, this Court reiterated the rule of *Fleischmann* and *Mills*, saying that "even where 'fee-shifting' would be appropriate as a matter of equity, Congress has the power to circumscribe such relief," — U.S. —, 93 S. Ct. 1948. Thus, *Hall*, like *Fleischmann* and *Mills*, indicates that courts may grant attorneys' fees *unless* Congress has forbidden such an award, and not, as the Fourth Circuit would have it, *only* when Congress specifically authorizes the award.

42 U.S.C. § 1983 is a broad provision designed to create a general right of action to protect rights guaranteed by the Fourteenth Amendment. Its legislative history does not indicate a Congressional intent to preclude equitable awards of attorneys' fees.⁵ Unlike the sections of the Lanham

⁵ If there can be any inference at all about what specific remedies Congress envisioned when it passed 42 U.S.C. § 1983, it would be that awards of attorneys' fees were contemplated. Section 1983 was originally section 1 of the Act of April 20, 1871, 17 Stat. 13. The original version of that section, after creating a cause of action, provided as follows:

"... such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases."

This was a clear direction to search as widely as possible for effective remedies, and especially to search among other remedies created by Congress in other civil rights laws. This command is reinforced by the reference to the Act of April 9, 1866 (14 Stat. 27), because the 1866 statute was largely concerned with seeking effective remedies. In following Congress' directions to seek remedies from among its own civil rights laws, one need look no further than a law passed 11 months earlier, the Act of May 31, 1870, 16 Stat. 140. This statute, designed to protect the right to vote, created civil causes of action in §§ 2, 3 and 4 and provided that offenders should

"forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the decision of the court."

The relationship of the Act of May 31, 1870, to the other civil rights statutes is further strengthened by the fact that § 16 of the Act of May 31, 1870, re-enacted a portion of § 1 of the Act of

Act considered in *Fleischmann*, it is not part of a "meticulously detailed" pattern of remedies indicating a clear Congressional intent to preclude awards of fees. Furthermore, it cannot be maintained that provisions for attorneys' fees in sections of the Civil Rights Act of 1964 evince a Congressional intent to disallow awards of fees in suits under 42 U.S.C. § 1983. Congressional actions in 1964 are not relevant to determining the intent of Congress in 1871, and the notion that statutory provisions for attorneys' fees in certain kinds of cases imply an intent to disallow awards of fees in other, similar kinds of cases was rejected by this Court in *Mills*, 396 U.S. at 390-91, and *Hall*, — U.S. at —, 93 S. Ct. at 1949.

The very essence of equity is its ability to consider the pragmatic realities of a case and to order relief that will be effective in enforcing the law and doing justice in the context of those realities. If equity is to perform this vital function, it cannot be restricted to explicit statutory remedies, except where Congress has indicated a clear intent so to restrict it. The District Court recognized that, considering the history of this case and the character of school desegregation cases in general, a denial of attorneys' fees would hamper and discourage litigation that was necessary to enforce strong statutory policies and to protect funda-

April 9, 1866 (now codified as 42 U.S.C. § 1981), and § 18 of the Act of May 31, 1870, explicitly re-enacted the entire Act of April 9, 1866.

Thus when Congress passed its statute on April 20, 1871, directing the courts to apply "other remedies provided in like cases" and "the other remedial laws of the United States which are in their nature applicable in such cases", it must have contemplated that one such remedy might be provision for counsel fees, which it had explicitly authorized in a civil rights law passed only 11 months before.

mental Constitutional rights. The District Court also recognized that justice required that the defendant school board compensate plaintiffs' attorneys for the services they had performed for the school district. The Fourth Circuit did not deny that plaintiffs' attorneys had performed a valuable service for the school district. Nor did it deny that the award of attorneys' fees would be an effective device for enforcing the law. Rather it took the position that, where Congress has failed to provide explicitly for awards of attorneys' fees, it "would be an unwarranted exercise of judicial power" for courts to employ awards of attorneys' fees in order to effectuate Congressional policies (Pet. App. 184a). The Fourth Circuit thus singled out awards of attorneys' fees as being somehow different from other equitable remedies and requiring specific Congressional authorization. The Fourth Circuit's position is contrary to decisions of this Court which give broad discretion to district courts in framing equitable relief and which approve the use of non-statutory remedies, including awards of attorneys' fees, in appropriate cases in equity.

CONCLUSION

As the District Court said, "Power over public education carries with it the duty to provide that education in a constitutional manner, a duty in which the defendants failed." (Pet. App. 137a.) When the defendants failed in this duty, plaintiffs, and their public-spirited attorneys, assumed the burden of eliminating unlawful racial discrimination from Richmond's public schools. By successfully litigating this action these impecunious school children and their attorneys have benefitted not only black school children,

but white school children, parents and other citizens of Richmond too. The service they have performed—that of ensuring that public schools are operated in accordance with the law—is one which should be performed by public officials at public expense. The beneficiaries of the action are the very people for whose benefit the resources of the Richmond school board are supposed to be used.*

This suit has enforced one of our most fundamental constitutional and statutory policies—the right to equality in educational opportunity. It arose in a statutory context in which private suits are an important means of enforcement. Moreover, as the district court said,

“ . . . this sort of case is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial . . . necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes.” (Pet. App. 136a)

When either the class benefit rationale or the full-and-appropriate-relief rationale is applicable, a court of equity should grant attorneys' fees to a successful private plaintiff, except where there is a clear Congressional intent to preclude such an award. In this case, as in *Sims v. Amos*, *supra*, both the class benefit rationale and the full-and-appropriate-relief rationale apply, and there are no indi-

* The school board has expended a substantial sum in defending this action. It would be ironic indeed for the taxpayers to pay for opposition to desegregation required by law and for private parties to bear the burden of bringing the school system into compliance with the law.

cations of a Congressional intent to preclude awards of fees. The District Court's award of attorneys' fees was in keeping with the rule that equity should fashion relief that is effective and appropriate under the circumstances. In spite of all this, and in spite of the well-established principle that district courts sitting in equity have broad discretion in framing relief, the Court of Appeals overturned the District Court's award.

The Court of Appeals based its reversal of the District Court's award on two grounds. One was explicit: Courts may not grant attorneys' fees on the basis of the full-and-appropriate-relief rationale without specific statutory authorization. The other was implicit: The class benefit rationale for awarding attorneys' fees does not apply unless the benefit to the class is pecuniary. Both these propositions are directly at odds with decisions of this Court and other courts of appeals.

The decision of the Fourth Circuit strikes at the heart of the equity powers of the courts. It would undermine a well-established equitable device for preventing unjust enrichment, and it would restrict courts to a wooden application of explicit statutory remedies. It would greatly impair the ability of the courts to deal fairly and flexibly with equitable claims and to provide effective protection for rights guaranteed by the Constitution and statutes of the United States.

For the foregoing reasons, the decision of the Court of Appeals should be reversed, and the order of the District Court reinstated.

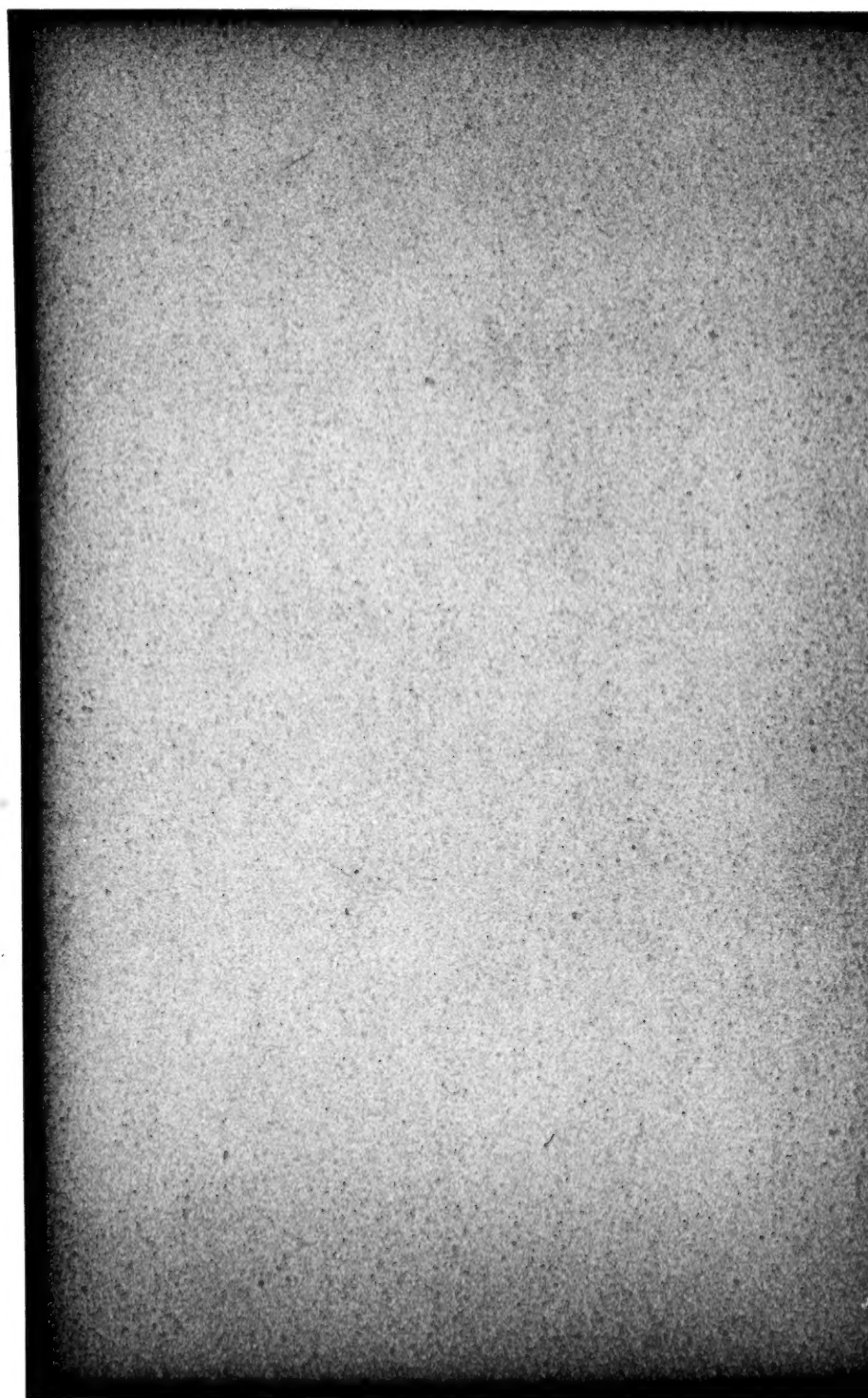
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Dated: August 24, 1973



IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*

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IN THE
Supreme Court of the United States

October Term, 1973

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported at 472 F.2d 318 and is set out in the Appendix (160a-193a). The opinion of the District Court is reported at 53 F.R.D. 28, and is set out in the Appendix (113a-145a).

Other opinions of the District Court, not dealing with the question of attorneys fees, are reported at 317 F. Supp. 555, 325 F. Supp. 828, and 338 F. Supp. 67.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 29, 1972. On February 21, 1973, Mr. Chief Justice Burger ordered that the time for filing a Petition for Writ of Certiorari in this case be extended to March 29, 1971. The Petition was filed on March 29, 1971 and was granted on June 11, 1973. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Did the District Court have the discretion to award attorneys' fees to successful plaintiffs in this school desegregation action?

Statutory and Constitutional Provisions Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983, 42 United States Code, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 718 of the Emergency School Aid Act of 1972, 86 Stat. 235, provides:

Upon the entry of a final order by a court of the United States against a local educational agency, a

State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary Education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Statement of the Case

This case was commenced in 1961 to desegregate the public schools of Richmond. Jurisdiction was claimed, *inter alia*, under 28 U.S.C. §1343 to enforce 42 U.S.C. §1983, and under 28 U.S.C. §1331 to enforce the Fourteenth Amendment, the amount in controversy exceeding \$10,000. Jurisdiction was conceded by the defendant school board.

In March, 1964, after extended litigation, the District Court approved a "freedom of choice" plan proposed by the defendant school board. Plaintiffs appealed to the Fourth Circuit Court of Appeals, which affirmed the lower court's finding that freedom of choice satisfied the school board's constitutional obligations. *Bradley v. School Board of Richmond, Virginia*, 345 F.2d 310 (1965). Plaintiffs then petitioned this Court for a Writ of Certiorari to consider the constitutionality of the freedom of choice plan. On November 15, 1965, this Court declined to review the Fourth Circuit's decision regarding freedom of choice, but did grant plaintiffs certain additional relief regarding discrimination in the assignment of teaching personnel. 382 U.S. 103.

Plaintiffs also sought attorneys' fees for this phase of the litigation. The District Court refused to award legal fees except for one \$75.00 allowance, and the Fourth Circuit affirmed the denial. 345 F.2d at 321. For the litigation prior to this decision of the Fourth Circuit the school board had paid their outside counsel \$6,580.00 (103a).

On March 30, 1966 the District Court approved a freedom of choice plan submitted by the parties. The plan expressly stated that freedom of choice would have to be modified if it did not produce significant results (20a-24a).

On May 27, 1968, this Court ruled that freedom of choice plans were not constitutionally permissible unless they actually brought about a unitary school system. *Green v. County School Board of New Kent County*, 391 U.S. 430.

On March 10, 1970, plaintiffs moved in the District Court for additional relief under *Green*. The defendant school board conceded that the freedom of choice plan under which it had been operating was unconstitutional. After considering a series of alternative and interim plans, the District Court on April 5, 1971, approved a plan for the integration of the Richmond schools involving pupil reassignments and transportation only within the city of Richmond. 325 F. Supp. 828. The defendant school board took no appeal from that decision.¹

On August 17, 1970, the District Court directed the parties to attempt to reach agreement on the matter of attorneys' fees. When the parties were unable to reach such an agreement, memoranda and evidentiary material were submitted to the court. On May 26, 1971, the District Court awarded plaintiffs attorneys' fees of \$43,355.00 as

¹ The defendant City Council of Richmond filed a notice of appeal from that decision on April 29, 1971, but on the motion of the City Council that appeal was dismissed on May 13, 1971.

well as costs and expenses of \$13,064.65. On appeal the Fourth Circuit, Judge Winter dissenting, reversed the award of attorneys' fees.²

Summary of Argument

I. Section 718 of the Emergency School Aid Act of 1972 authorizes the award of counsel fees to a successful plaintiff in a school desegregation case. Such fees must be directed in the absence of special circumstances rendering such an award unjust. *Northcross v. Board of Education of Memphis City Schools*, 41 U.S.L.W. 3635 (1973). No such special circumstances are present in this case.

Section 718 should be applied to all cases pending on appeal as of the date it became effective, July 1, 1972. The general rule followed by this Court is that changes in the law are applied to all cases pending on appeal when the change occurs. *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969). The only exception to that rule is where the application of the new statute to events occurring before its enactment will result in manifest injustice. The award of counsel fees under section 718 in this case would in no way be unfair to the defendant school board. On the contrary, such an application of section 718 would carry out Congress's desire that school boards which violate the law pay the attorneys' fees of private citizens forced to sue to obtain their rights.

II. This Court has expressly sanctioned the award of attorneys' fees where a successful litigant wins relief which benefits others and where the award will serve to pass the

² Although the school board's notice of appeal mentions the awards of both attorneys' fees and costs, only the matter of attorneys' fees was briefed, and the Fourth Circuit's decision does not deal with the costs.

cost of that litigation on to the other beneficiaries. *Hall v. Cole*, 36 L. Ed. 2d 702. Such an award of counsel fees is made, not to penalize the defendant, but to assure that those who desire benefits from the litigation are not unjustly enriched thereby.

The instant plaintiffs, by desegregating the schools of Richmond to the extent possible within the city, conferred a substantial benefit on all the students affected. Since the funds of the defendant school board are held for the use and benefit of those same students, an award of counsel fees against the school board serves to pass the cost of this litigation on to those other beneficiaries.

III. Plaintiffs maintained this action, not merely on their own behalf, but to vindicate important statutory and constitutional policies. The school integration achieved by the instant case benefits, not merely the students immediately affected, but the public at large. Such litigation also benefits the defendant school board, whose first interest and obligation is to comply with the Constitution. Where private litigants enforce important statutory or constitutional provisions and thus benefit the public, they are entitled to legal fees under the rationale of *Hall v. Cole*, just as they would be for a benefit conferred upon a smaller ascertainable group.

Courts of equity traditionally fashion new remedies to solve problems not adequately dealt with at law. The proliferation of important national policies enforceable only through private civil litigation is such a problem, for the cost of such litigation generally exceeds the benefit to any individual plaintiff. The award of counsel fees to make possible such litigation by private attorneys general carries out equity's policy of seeking to do complete justice in any case, and accords with provisions of 42 U.S.C. §1983,

broadly authorizing actions to "redress" deprivation of constitutional rights. Compare, *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

IV. Plaintiffs are entitled to counsel fees because of the defendant school board's conduct.

1. Prior to this latest round of litigation, the District Court in 1966 directed the establishment of a plan involving freedom of choice. In 1968 this Court declared such plans illegal where, as here, they did not in fact result in desegregation. *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430. Despite the illegality of Richmond's freedom of choice plan, and although the defendant school board must have been aware of *Green*, the board obstinately persisted in operating that unlawful plan for two years until brought back into court by plaintiffs. The District Court correctly found there was no justification for the board's decision to continue operating a system which they conceded was unconstitutional, and thus forcing plaintiffs to resort to private civil litigation. Under those circumstances the award of counsel fees was well within the District Court's discretion.

2. The award is also justified by the conduct of the board in proposing to the court two manifestly inadequate plans of desegregation in the spring and summer of 1970. The legal services for which fees were awarded to plaintiffs were rendered in opposing these two plans. The first plan, proposed in May 1970, would have left two-thirds of Richmond's schools overwhelmingly white or overwhelmingly black. The second plan, of July 1970, would have left a substantial number of overwhelmingly white or black high schools and middle schools, and placed about half the black students and half the white students in such segregated elementary schools. Both plans were clearly inade-

quate under the Fourth Circuit's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 138 (1970). The District Court clearly had the discretion to award counsel fees to plaintiffs for legal services rendered in opposing these two plans.

ARGUMENT

I.

Section 718 of the Emergency School Aid Act of 1972 Requires the Award of Attorneys' Fees in This Case.

While this case was pending before the Court of Appeals, Congress enacted the Emergency School Aid Act of 1972.³ Section 718 of that Act provides:

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance,

³ This development was brought to the court's attention, but the Fourth Circuit ruled that section 718 was not applicable to the instant case. In its opinion in the instant case the Court of Appeals held that there was no final judgment to which the award of fees could be connected (187a-188a). In a companion case, *Thompson v. School Board of Newport News*, 472 F.2d 177 (1972), the court held that section 718 only authorized legal fees for work done after the effective date of the statute, July 1, 1972.

may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 718 is applicable to the instant case, and requires the award of attorneys' fees.

This Court has already held that, in cases falling under Section 718, the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Northcross v. Board of Education of the Memphis City Schools*, 41 U.S.L.W. 3635 (1973); compare *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). No such special circumstances are present in the instant case. The District Court expressly inquired whether there were special circumstances which might render an award unjust, citing the standard in *Newman*, and found there were not. 140a. The Court of Appeals noted that the award of attorneys' fees under the *Newman* standard were "either mandatory or practically so," 183a, but did not expressly decide whether the *Newman* standard had been met. The only circumstance in this case which the Court of Appeals felt militated against legal fees was its conclusion that, in view of the alleged uncertainty as to the constitutional requirements, the various defenses and plans put forward by the school board, though legally insufficient, were not advanced for purposes of delay or, in bad faith. 177a. Such good faith, however, has been expressly held not to fall within the narrow category of special circumstances permitting the denial of attorney's fees in these cases. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 (1968). There is of course no question that the instant action was necessary to bring about compliance. The school board was in violation of the District Court's 1966 decree and of the decisions of this Court, and made no pretense that it would change its ways other than under court order.

Section 718 further requires that legal fees may be awarded "upon the entry" of a final order against a defendant school board based on a violation of the Fourteenth Amendment or certain statutes. The quoted phrase does not require, of course, that the award of legal fees be simultaneous with the entry of such an order, but makes the existence of such a final order a prerequisite to the award of attorneys' fees. Several such orders had been entered and became final prior to the award of attorneys' fees in this case on May 26, 1971.⁴ Where, as here, the course of litigation in a district court involves the entry of several orders over a period of months or years, neither section 718 nor sound judicial administration require that the question of legal fees be litigated separately and repetitiously upon the occasion of each such order. A request for fees may present difficult questions of fact or require the taking of evidence which might interfere with a court's simultaneous efforts to dismantle a dual school system. Costs, of which attorneys' fees are made a part by section 718, are normally imposed after the final disposition of the case. Doubtless a District Court has discretion to award costs and attorneys' fees incident to the disposition of interim relief matters, 6 Moore's Federal Practice ¶54.70[5], and it would be particularly desirable to exercise that discretion where, as is common in litigation under *Brown*, the fashioning of effective relief occurs over a period of years and delay in awarding fees and costs may work hardship on plaintiffs or their counsel. That discre-

⁴ On June 20, 1970, the District Court ordered a suspension of all school construction in Richmond pending the approval of a final plan. On August 17, 1970, the District Court ordered into operation an interim plan for the 1970-71 school year. On April 5, 1971, the District Court ordered into operation the plan under which the Richmond schools are now operating. Each of these orders had become final when the attorneys' fees were awarded on May 26, 1970.

tion, however, exists for the protection of the plaintiff and his attorney; a defendant cannot be heard to complain if it is not so exercised.⁵

The defendant school board maintains, however, that section 718 should not be applied to the instant case because the legal services for which fees are sought were rendered prior to July 1, 1972, the date on which section 718 became effective.⁶ Plaintiffs contend that section 718 should be applied to any case in which the propriety of an award of legal fees was still pending resolution on appeal as of July 1, 1972, regardless of when the services were performed. This case does not present the question of whether section 718 should be applied, retroactively, to cases in which the question of legal fees had been presented and been resolved by a final order prior to July 1, 1972.

Since *United States v. Schooner Peggy*, this Court has recognized that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." 5 U.S. (1 Cranch) 103,

⁵ The Court of Appeals refused to apply section 718 to the instant case on the ground, *inter alia*, that on the effective date of the Act there was no final order regarding the substantive claim of discrimination pending on appeal (187a-188a). This standard, in the sense it was used, could never be met, for no order could be both final and also pending on appeal. If, as plaintiffs contend, section 718 should apply to services performed prior to July 1, 1972, there is no precedent for requiring that such fees be arbitrarily denied because of the date on which an order was entered directing the desegregation of a defendant school district.

⁶ The date on which a law becomes effective is not the same thing as the date from which the law shall apply. The former date describes the time at which the courts will begin to invoke the law in dealing with events or transactions; the latter date delimits the class of events or transactions as to which that law may be invoked. For an example of a statute specifying both effective date and the transactions to which it applied, see section 104 of the Jury Selection Act of 1968, Pub.L. 90-274.

106 (1801). This Court has applied on appeal intervening changes in the law under a wide variety of circumstances. In *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), after the plaintiff public housing authority had won an eviction order in state courts, the Department of Housing and Urban Development altered the procedural prerequisites to such evictions. This Court held that the defendant could not be evicted unless the new procedures were followed. "The general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." 393 U.S. at 281. In *United States v. Alabama*, 362 U.S. 602 (1960), the district court dismissed an action brought by the United States under the 1957 Civil Rights Act against the state of Alabama on the ground that the State could not be sued under that statute. While the case was pending on appeal Congress passed the 1960 Civil Rights Act expressly authorizing suits against a state, and this Court applied the new statute. "Under familiar principles, the case must be decided on the basis of law now controlling, and the [new provisions] are applicable to this litigation." 362 U.S. at 604. In *Ziffrin v. United States*, after a company seeking permission to operate as a contract carrier had filed its application with the Interstate Commerce Commission, the Interstate Commerce Act was amended to bar such operation by an applicant who was controlled by a common carrier serving the same territory. This Court upheld the application of the new law to the pending request. "A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law. *A fortiori*, a change of law pending an administrative hearing must be followed in relation to permission for future acts." 318 U.S. 73, 78 (1943). See also *Vanderbark v. Owens-Illinois Glass Company*, 311 U.S. 538 (1941); *Carpenter v. Wabash Railway Co.*, 309 U.S. 23, 27 (1940), and cases cited; *American Steel Foundries v.*

Tri-City Cent. Trades Council, 257 U.S. 184, 201 (1921); *Reynolds v. United States*, 292 U.S. 443, 449 (1934).

Except where the statute involved expressly purports to be of exclusively prospective application, see e.g. *Goldstein v. California*, 41 U.S.L.W. 4829, 4830 (1973), this Court has routinely applied new laws to all cases pending on appeal, without reference to legislative history and without requiring express statutory language that they be so applied. When Congress has concluded that greater justice would be done if a new and different legal principle were applied to some recurring circumstances, Congress must be presumed to have intended that that new standard and the more equitable result entailed be applied to all cases, including those pending on appeal. Compare *Johnson v. United States*, 163 F.2d 30, 32 (1st Cir. 1908) (Holmes, J.).

A narrowly drawn exception to this practice has been sanctioned by this Court where, under the facts of a particular case, application of a new law to a matter arising before its enactment would work an unfair hardship on one of the parties. In such a situation this Court has, where possible, sought to construe the statute to avoid such an inequitable result. The precise category of cases to which this exception applies has never been clearly defined. In *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), this Court urged such a rule of construction "in mere private cases between individuals." 5 U.S. at 106. In *Union Pacific Railroad Co. v. Laramie Stock Yards Co.*, this Court explained the rule applied to statutes which might interfere with "antecedent rights," 231 U.S. 190, 199 (1913). *Cox v. Hart* defined a "retroactive" statute as one which impaired a vested right or imposed a new obligation on a private interest, and indicated that statutes should not readily be construed as "retroactive" in this

sense. 260 U.S. 427, 435 (1922). In *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141 (1944), the Court deliberately construed a new tax law so as not to retroactively increase the taxes on "closed transactions." 323 U.S. at 164. In *Greene v. United States*, 376 U.S. 149 (1963), this Court refused to apply new and more strenuous administrative procedures for obtaining remuneration to a claimant who had already obtained a "final" and favorable determination under the old procedures. 376 U.S. at 161. Most recently, in *Thorpe v. Housing Authority of Durham*, this Court characterized *Greene* and its predecessors, more simply and more cogently, as exceptions "made to prevent manifest injustice." 393 U.S. at 282.⁷

The application of section 718 to the instant case would work no injustice such as that threatened in *Greene*. Section 718 did not alter the defendant school board's constitutional responsibility to provide an education free of the

⁷ The difference between the rule reaffirmed in *Thorpe* and the exception applied in *Greene* is well illustrated by the facts in those cases. Both cases involved disputes between a private citizen and a government agency. In *Thorpe* a city public housing authority had sued to evict the defendant tenant; in *Greene* a private citizen who had been discharged when the Department of the Navy revoked his security clearance brought an action for lost wages. In both, while the litigation was still pending and before Mr. *Greene* had received reimbursement or Mrs. *Thorpe* been evicted, the procedures for reimbursement and eviction, respectively, were changed. However, in *Thorpe* the application of the new rule accrued to the benefit of the private citizen, whereas in *Greene* this Court refused to apply the change where the beneficiary would have been the government not the individual litigant. In *Greene* the application of the new rule would have interfered with a right to reimbursement which had been established and became final, 376 U.S. at 161; in *Thorpe* the Housing Authority had no comparable rights to infringe, 393 U.S. at 283. And, while in *Thorpe* the tenant had insisted throughout the litigation that she was entitled to procedural protections guaranteed by the new provision, in *Greene* the government had never questioned the procedures being followed until seven years after the litigation began, those procedures were altered by administrative regulations. Compare *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 418-419 (1971).

stigma of segregation, and plaintiffs do not seek to apply retrospectively any new standard of conduct first established in 1972. The school board's substantive obligations are those of the Constitution, as announced by this Court; section 718 only elaborates the remedy available to a private citizen when local officials have violated the law. As Senator Cook remarked during the debate on section 718:

The 14th amendment to the Constitution of the United States was there long before we [Congress] came to a conclusion that something should be done in the field of discrimination in the school system of the United States. We are not talking about something that was born yesterday.⁸

The school board in the instant case does not claim it would have acted any differently between 1966 and 1972 had section 718 been in effect at that time. Under such circumstances, the application of section 718 to litigation occurring before its effective date can hardly be said to be unfair. The only relevant right which existed prior to the enactment of section 718 was the right of the instant plaintiffs to an education in a unitary school system; application of section 718 to this case serves not to impair that right but to vindicate it. Plaintiffs' assertion that they are entitled to attorneys' fees is not a new claim suddenly asserted in the light of section 718; such fees were asked in the original complaint filed in 1961,⁹ and have repeatedly been sought in the proceedings since that time.

That legal fees should be awarded under section 718 for work done before its effective date is supported by the

⁸ 117 Cong. Rec. 11528.

⁹ See 4a.

legislative history of the Emergency School Aid Act of 1972.¹⁰

Section 718 grew out of a provision contained in a bill sponsored by Senator Mondale in 1971. The statute proposed by Senator Mondale would have authorized the payment of counsel fees out of federal funds specially set aside for that purpose, \$5 million for the first year and \$10 million for the second. That proposal, included in the committee bill presented to the Senate, expressly stated that the award would be "for services rendered, and costs incurred, *after* the date of the enactment of this Act . . ."¹¹ (Emphasis added) On the floor of the Senate,

¹⁰ The predecessor to section 718 was first proposed by Senator Mondale. S. 683, 92nd Cong., 1st Sess., §11. It was reported out of committee as section 11 of S.1557. See Sen. Rep. No. 92-61, 92nd Cong., 1st Sess. On April 21, 1971, at the urging of Senators Dominick and Cook, section 11 was stricken from the proposed bill. 117 Cong. Rec. 11338-11345. The next day, on an amendment sponsored by Senator Cook, section 718 in its present form was inserted in the bill. 117 Cong. Rec. 11521-11529, 11724-26. The House amended the bill passed by the Senate, striking everything after the enacting clause and inserting a new text which, *inter alia*, deleted any mention of counsel fees. The provision for legal fees was restored in conference. Conference Rep. No. 798, 92nd Cong., 2nd Sess. (1972). The only debate on the subject of attorneys' fees occurred in the Senate on April 21 and 22, 1971.

¹¹ Section 11(a) of Senator Mondale's bill, S.683, 92nd Cong., 1st Sess., provided in full:

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the Department of Health, Education, and Welfare for failure to comply with any provision of this Act, title I of the Elementary and Secondary Education Act of 1965 or discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or of the fourteenth article of amendment to the Constitution of the United States as they pertain to elementary and secondary education, such court shall award, from funds reserved pursuant to section 3(b)(1)(c), reasonable counsel fee, and costs not otherwise reimbursed, for services rendered, and

Senator Dominick, with the support of Senator Cook, successfully amended the bill to delete this proposed section in its entirety.¹² The next day, however, Senator Cook proposed to substitute new provisions authorizing the award of such attorneys' fees against the defendant.¹³ This new provision *deleted* the language in Senator Mondale's version which had limited the section to services rendered after its enactment. This Court should not read back into section 718 the very limitation regarding application to services performed prior to enactment which was deliberately removed from the statute by Congress.

The application of section 718 to cases pending when it was enacted serves to carry out the purposes of that provision as expressed in the congressional hearings and debates leading to its enactment. Senator Mondale, who first urged a statutory authorization of legal fees in these cases, argued that his proposal and that of Senator Cook were needed to encourage more private litigation,¹⁴ and to equalize the legal resources available to litigants in such cases.¹⁵ If, however, such fees are only awarded for work done after July 1, 1972, and after the entry of a final order resulting from and subsequent to those services, substantial additional funds under this section for the increase of

costs incurred, after the date of enactment of this Act to the party obtaining such order.

Similarly, the Committee Report states that the federal funds are available "for services rendered, and costs incurred, after the date of enactment of the Act." Sen. Rep. No. 92-61, 92nd Cong., 1st Sess., pp. 55-56 (1971).

¹² 117 Cong. Rec. 11345.

¹³ 117 Cong. Rec. 11520-21.

¹⁴ 114 Cong. Rec. 10760, 10761, 10762-3, 10764, 11339-40, 11343, 11344, 11345.

¹⁵ Hearings Before the Subcommittee on Education of the Senate Labor and Public Welfare Committee, 92nd Cong., 1st Sess. 99 (1971); 114 Cong. Rec. 10762.

private litigation will not be available for years.¹⁶ It is hardly likely that Senator Mondale envisioned or desired such a delay when he called for a statutory right to legal fees to meet the "urgent need" for vigorous private litigation to resolve the "major crisis in the enforcement of constitutional protections affecting civil rights in this land."¹⁷

Senator Cook, the draftsman and sole spokesman for section 718 as finally enacted, emphasized an additional reason for his amendment. Senator Cook opposed Senator Mondale's proposal on the ground that it failed to require that the school system which had violated the law pay the costs incurred in rectifying that violation. He urged:

[W]e can solve the problem by merely inserting the language that the costs and attorneys' fees will be

¹⁶ The practical realities of school litigation are such that the goal sought by Senator Mondale will be substantially delayed if attorneys' fees are not awarded for services performed prior to the effective date of the statute. The vast majority of school desegregation cases have in the past been, and will continue to be, brought by a handful of private attorneys supported in many instances by national organizations concerned with such litigation. The costs and salaries of the attorneys must be paid by those organizations or sacrificed by those attorneys from the moment a case is begun, but such costs and fees are only available under section 718 after a final judgment has been entered in the case. The delay between the commencement of an action and the entry of any final judgment will often be substantial. In the cases decided *sub nom. Thompson v. School Board of the City of Newport News*, 472 F.2d 177 (1972), in which the Fourth Circuit refused to apply section 718 to work done before its effective date, the complaints initiating those actions had first been filed in 1961, 1965, 1969 and 1970. If section 718 is limited to work done after July 1, 1972, it will be years before that statute yields sufficient legal fees to enable private attorneys and their organizational sponsors to increase the number of school desegregation cases they are financially able to handle. On the other hand, if such fees are made available now in appropriate pending cases for work done before July 1, 1972, the resources will be available at once to make possible the increase in such litigation sought by Congress.

¹⁷ 117 Cong. Rec. 10760, 10762. See also 117 Cong. Rec. 11339, 11342, 11343, 11344.

charged against the losing litigant. . . . We can even charge those expenses and make them a debt against the Title I funds, so that we are penalizing the person who violates the law; we are penalizing the person who decides the 14th amendment is for someone else and not for him. We are then *imposing the cost on that individual who saw fit to commit an act that the court concluded was in violation of the law*, or in violation of the proper utilization of Title I funds and that, as an indirect result thereof, that person shall suffer.¹⁸

In the debates on his own amendment, Senator Cook reiterated his desire to place the cost of litigation on the "guilty party",¹⁹ to assure that a school board violating the law will "pay for it",²⁰ and to provide that those who have disobeyed the constitution "should have to make recompense for that mistake."²¹ Senator Cook also referred, as had Senator Mondale,²² to the inequity of paying with education funds for the lawyers who unsuccessfully opposed integration, but not using those funds for attorneys who achieved an end to segregation.²³

¹⁸ 117 Cong. Rec. 11343 (Emphasis added). See also 117 Cong. Rec. 11341, 11342.

¹⁹ 117 Cong. Rec. 11725.

²⁰ 117 Cong. Rec. 11527.

²¹ 117 Cong. Rec. 11528.

²² Hearings Before the Subcommittee on Education of the Senate Labor and Public Welfare Committee, 92nd Cong., 1st Sess. 99 (1971) "Now, most of the money today being spent publicly in school desegregation cases is public money which is being spent for lawyers and legal fees to resist the reach of the 14th amendment. So why would it not be fair to set aside a modest amount to pay lawyers who are successful in enforcing the Constitution for legal fees and costs."

²³ 117 Cong. Rec. 11527, 11528.

It is reasonable to assume that Congress contemplated that the injustices discerned by Senator Cook would be righted in cases still pending when section 718 became effective. It cannot plausibly be maintained that Senator Cook intended that, months or years after the enactment of section 718, school boards which had violated the law would be able to avoid recompensing those who corrected their mistakes merely because the plaintiffs' attorneys were diligent enough to bring that violation to an end prior to July 1, 1972.²⁴ The statute involved here is not one intended merely to shape future events by encouraging the initiation of litigation under the Fourteenth Amendment, compare *Linkletter v. Walker*, 381 U.S. 618 (1965), but was designed to effectuate Congress' judgment that a serious injustice is worked when, in a case such as this, the offending school board pays no price for its years of ignoring *Brown*, while the private plaintiff must look to himself and the generosity of his counsel or the public to meet the costs of enforcing the constitution. Compare *Jackson v. Denno*, 378 U.S. 368 (1964). In deciding who shall ultimately bear the cost of litigation to end discrimination in the public schools, this

²⁴ Both Senator Mondale and Senator Cook explained that their goal was to provide the same right to attorneys' fees in school discrimination cases as exist for discrimination in housing, 42 U.S.C. §3612(c), in employment, 42 U.S.C. §2000e-5(A), and public accommodations, 42 U.S.C. §2000a-e(b). 117 Cong. Rec. 11339. (Remarks of Senator Mondale), 11521 (Remarks of Senator Cook) See *Northcross v. Board of Education of the Memphis City Schools*, 41 U.S.L.W. 3635 (1973). In the absence of special circumstances, a successful plaintiff in a housing, employment or public accommodations case would be entitled to attorneys' fees for all the legal services performed in connection with a case won on April 5, 1972 (the day final relief was awarded here) or July 1, 1972 (the day section 718 became effective). Because the substantive rights and counsel fee provisions were created by the same statute, sections 2000a-3(b), 2000e-5(k) and 3612(c), 42 U.S.C., apply to all actions described therein, regardless of when commenced. Congress presumably intended to create a similarly broad right covering all work done in all school cases.

Court should give full effect to the standards and values established by Congress in section 718 in all cases in which the question of attorneys' fees has not been finally resolved before July 1, 1972.

II.

Attorneys' Fees Must Be Awarded Because This Litigation Benefited Others.

In the absence of an express statutory requirement of attorneys' fees, federal courts in the exercise of their equitable powers may award such fees where the interests of justice so require. Their authority to do so derives from Article III²⁵ of the Constitution and, in cases such as this, section 1983, 42 U.S.C.²⁶ As Justice Frankfurter noted a generation ago, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 (1939). Federal courts do not hesitate to exercise this inherent equitable power wherever "overriding considerations indicate the need for such a recovery." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970).

One well-established case in which such fees are awarded is where a plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class," and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. *Mills v.*

²⁵ "Section 2. Jurisdiction. The judicial power shall extend to all Cases, in law and *Equity*, arising under this Constitution, the Laws of the United States, and Treaties made . . ." (Emphasis added.)

²⁶ Section 1983 authorizes "an action at law, suit in *equity*, or other proper proceeding for redress." (Emphasis added.)

Electric Auto-Lite, 396 U.S. at 393-94. This rule has its origins in the "common-fund" cases, which have traditionally awarded attorneys' fees to the successful plaintiff when his representative action creates or traces a "common-fund," the economic benefit of which is shared by all members of the class. See, e.g. *Central Railroad and Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527 (1883). In *Sprague v. Ticonic National Bank*, the rationale of these cases was extended to authorize an award of attorneys' fees to a successful plaintiff who, although suing on her own behalf rather than as a representative of a class, nevertheless established the right of others to recover out of specific assets of the same defendant through the operation of *stare decisis*. In reaching this result, the Court explained that the beneficiaries of the plaintiff's litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries would eventually recover. Finally, in *Mills v. Electric Auto-Lite Co.*, this Court held that the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation "which corrects or prevents an abuse which would be prejudiced to the rights and interests" of those others. 396 U.S. at 396.²⁷

Fee-shifting is justified in these cases because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills v. Electric Auto-Lite Co.*, 396 U.S. at 392; see also *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719 (1967); *Trustees v. Greenough*, 105 U.S. 527, 532 (1882). Thus, in *Mills* this Court ap-

²⁷ Also supporting the award in *Mills* was the fact that the action vindicated important statutory policies. 396 U.S. at 396.

proved an award of attorneys' fees to successful shareholder plaintiffs in a suit brought to set aside a corporate merger accomplished through the use of a misleading proxy statement in violation of §14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78(a). In reaching this result, this Court reasoned that, since the dissemination of misleading proxy solicitations jeopardized important interests of both the corporation and "the stockholders as a group," the successful enforcement of the statutory policy necessarily "rendered a substantial service to the corporation and its shareholders." 396 U.S. at 396. In *Hall v. Cole*, 36 L. Ed. 2d 702 (1973), legal fees were approved for a union member who successfully sued for reinstatement in his union after he had been expelled for criticizing the union's officers. This Court concluded that the plaintiff, by vindicating his own right, had dispelled the "chill" cast upon the right of others, and contributed to the preservation of union democracy. 36 L. Ed. 2d at 709. Both *Mills* and *Hall* involved a benefit that was not pecuniary in nature.²⁸

²⁸ In *Mills* this Court expressly repudiated any requirement that the benefit be pecuniary.

The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into court as a prerequisite to the court's power to order reimbursement of expenses. . . . [A]n increasing number of lower courts have acknowledged that a corporation may receive a 'substantial benefit' from a derivative suit, *regardless of whether the benefit is pecuniary in nature*. . . . [I]t may be impossible to assign monetary value to the benefit. Nevertheless . . . petitioners have rendered a substantial service to the corporation and its shareholders. 396 U.S. at 392, 395-396. (Emphasis added.)

Following *Mills*, legal fees have been awarded in cases involving such non-pecuniary benefits as guaranteeing free and fair union

Such legal fees are assessed against the defendant, not because of any bad faith, but because the costs will thus be passed onto and borne by the benefiting class. In the early common-fund cases, the fee was deducted directly from a sum of money held for distribution to the beneficiaries. *Trustees v. Greenough*, 105 U.S. 527 (1882). In *Mills v. Electric Auto-Lite Co.*, the beneficiaries of the action were a corporation and its stockholders; by awarding attorneys fees against the corporation the Court simultaneously assessed one of the beneficiaries and assured that the cost would be borne by the stockholders as owners of the corporation. 396 U.S. 375, 390. In *Hall* the fees were paid out of the treasury of the union involved, the contents of which were held for use by the union on behalf of its members, the beneficiaries of the action involved. 36 L. Ed. 2d at 709.

The instant case is clearly governed by *Mills* and *Hall*. Plaintiffs, in dismantling the dual school system within the city of Richmond benefited many persons other than themselves.²⁹ This case is a class action on behalf of all

elections, *Yablonski v. United Mine Workers of America*, 466 F.2d 424 (D.C. Cir. 1972), cert. denied 41 U.S.L.W. 3624 (1973), discrimination in public housing, *Hammond v. Housing Authority*, 328 F. Supp. 586 (D. Ore. 1971), and inadequate medical facilities for prisoners. *Newman v. State of Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972). See also *Callahan v. Wallace*, 422 F.2d 59 (5th Cir. 1972); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972); *Sincock v. Obara*, 320 F. Supp. 1098 (D. Del. 1970). Legal fees have also been awarded to plaintiffs who simultaneously effectuated public policies and benefited others where the benefits involved such non-pecuniary matters as legislative reapportionment, *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972) and ending jury discrimination, *Ford v. White* (S.D. Miss., Civil Action No. 1230(N), opinion dated August 4, 1972.)

²⁹ The plaintiffs were able to achieve only such integration as was possible within the city itself. A complete dismantling of the dual system involved would have required merger with the surrounding predominantly white counties. See *Bradley v. State Board of Education*, No. 72-550 and *School Board of the City of Richmond, Virginia v. State Board of Education*, No. 72-549.

the school children of Virginia and their parents or guardians (4a). The harm suffered by black children when compelled to attend segregated schools is well recognized. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954);³⁰ Coleman, et al., *Equality of Educational Opportunity* (1966); U.S. Civil Rights Commission, *Racial Isolation in the Public Schools*, 106 (1967).³¹ Nor can the maintenance of a dual school system be said to have benefited the white students involved.³² Compare *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972).

³⁰ "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

³¹ "School personnel in predominantly white schools more often feel that their students have the potential and the desire for high attainment. The *Equality of Education Opportunity* survey found that white students are more likely to have teachers with high morale, who want to remain in their present school, and who regard their students as capable.

"The environment of schools with a substantial majority of Negro students, then, offers serious obstacles to learning. The schools are stigmatized as inferior in the community. The students often doubt their own worth, and their teachers frequently corroborate these doubts. The academic performance of their classmates is usually characterized by continuing difficulty. The children often have doubts about their chances of succeeding in a predominantly white society, and they typically are in school with other students who have similar doubts. They are in schools which, by virtue both of their racial and social class composition, are isolated from models of success in school."

³² For white children, as for black, a vital part of their education consists in learning, through contact with their fellows, about the society in which they live and shaping through such contact the values which will guide them for years to come. Racial isolation cuts off these students from others with widely divergent views

Viewed in this context, there can be no doubt that plaintiffs, to the extent that they succeeded in dismantling the dual school system in Richmond, rendered a substantial service to the public school students of Richmond. Requiring reimbursement of plaintiffs' attorneys' fees out of the funds³³ of the school board "simply shifts the costs of litigation 'to the class that has benefited from them and would have had to pay them had it brought the suit.'" *Hall v. Cole*, 36 L. Ed. 2d at 709.

Although such fee shifting is within the inherent authority of equity, Congress has the power to circumscribe such relief. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), for example, this Court held that the Lanham Act precluded an award of attorneys' fees in a trademark infringement case because the statute "meticulously detailed the remedies available" and Congress must have intended these express remedial provisions "to mark the boundaries of the power to award monetary relief in

and experiences, and may inculcate fears and prejudices overcome only with great effort later in life. Students who may pursue business careers in the areas where they were educated will be deprived of contacts and acquaintances of commercial importance. Nor is it inconceivable that, among a new generation of Americans free of racial bigotry, an education in an all white school, particularly in the South, will carry a social stigma inconceivable to earlier generations.

³³ Those funds are held for use on behalf of the public school students who benefited from this action. Section 22-97(12) of the Code of Virginia authorizes the use of such funds: "to provide for the pay of teachers and of the clerk of the board, for the cost of providing schoolhouses and the appurtenances thereto and the repairs thereof, for school furniture and appliances, for necessary textbooks for children attending the public free schools whose parent or guardian is financially unable to furnish them; and for any other expenses attending the administration of the public free school system, so far as the same is under the control or at the charge of the school officers."

3. at 719, 721.³⁴ Unlike cases arising under the Act," 386 U.S. no specific authorization of the Lanham Act, section 1983 contains no specific authorization of detailed remedies; rather, it broadly authorizes the grant of such remedies as may be appropriate.³⁵ A court may grant whatever relief may be appropriate at law, suit in equity, or otherwise, if the defendant is made liable "in an action or proceeding." Section 1983 or other proper proceeding for any of the proceedings which it recites, not remedies, but the type of action or proceeding which may be maintained, and the clear intent of Congress was not to set any boundary on the type of actions which be maintained, but to provide on the contrary that *any* appropriate proceeding may be commenced. The enactment, some 93 years after section 1983, of Title IV of the 1964 Civil Rights Act in no way limits the extensive grant of authority in section 1983 or circumscribes the inherent equitable power left unimpaired by that section. Title IV does not confer upon private parties any new legal remedies, and expressly provides that nothing therein shall "affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education." 42 U.S.C. §2000c-8.³⁶

³⁴ The statute in *Fleischmann* expressly detailed six specific remedies, including award of the plaintiff's damage, the defendant's profits, the costs of the action, additional damages up to three times the amount actually sustained, any amount over and above the defendant's profits if that recovery proved inadequate, 15 U.S.C. §1117, as well as injunctive relief. 15 U.S.C. §1116.

³⁵ See *Ross v. Goshi*, 35 F. Supp. 949, 955 n.15 (D. Hawaii 1972) ("Section 1983, on the other hand, is not a statute providing detailed remedies, and there is no reason to infer any congressional intent to limit the otherwise broad equitable powers of this court.") *NAACP v. Allen*, 340 F. Supp. 703, 709-710, n.9 (M.D. Ala. 1972); *Sims v. Amos*, 340 F. Supp. 691, 695 (M.D. Ala. 1972). See also *Lee v. Southern Home Sites*, 444 F.2d 143, 145 (5th Cir. 1971) (§1982).

³⁶ The decision of the Court of Appeals suggests that Congress may have intended to revoke this Court's inherent power to grant attorney's fees when, in the 1964 Civil Rights Act, it dealt with school segregation in Title IV without authorizing legal fees, whereas such fees were provided for in Titles II and VII. Section 2000e-

III.

Plaintiffs Are Entitled to Attorneys' Fees Because They Maintained This Action as Private Attorneys General.

A substantial number of lower courts have concluded that successful plaintiffs should be awarded attorneys' fees where they sue, not merely on their own behalf, but to enforce important constitutional or statutory policies.³⁷ Replying on both the reasoning and standard set in this Court's opinion in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), these decisions have concluded that legal fees should be awarded to such private attorneys general unless there are special circumstances which would render an award unjust. The District Court in the instant case relied on this ground as an alternative basis for its award of fees (135a-141a). This Court, however, has not indicated whether plaintiffs can recover fees as private attorneys general in the absence of an express authorization such as that present in *Newman*.³⁸ Plaintiffs maintain

8 forbids any such conclusion however. If the existence of any part of Title IV is not to adversely affect the right to counsel fees, *ipso facto* the existence of Title IV itself cannot do so.

³⁷ *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Ross v. Goski*, 351 F.Supp. 949 (D. Hawaii 1972); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972); *Ford v. White* (S.D. Miss., Civil Action No. 1230(N), opinion dated August 4, 1972); *Jinks v. Mays*, 350 F.Supp. 1037 (N.D. Ga. 1972); *Wyatt v. Stickney*, 344 F.Supp. 387 (M.D. Ala. 1972); *NAACP v. Allen*, 340 F.Supp. 703 (M.D. Ala. 1972); *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala. 1971).

³⁸ This Court expressly declined to reach that question in *Hall v. Cole*, 36 L. Ed. 2d 702, 708 n.7 (1973), and *Northerross v. Board of Education of the Memphis City Schools*, 41 U.S.L.W. 3635 n.2 (1973).

that such awards are proper, and would urge this Court to resolve this question of growing importance for the guidance of the lower courts.

The well established common benefit cases, discussed *supra*, sanction the award of attorneys' fees where a plaintiff's action confers a substantial benefit on the members of an ascertainable class, such as the members of a union or the shareholders of a corporation. *Hall v. Cole*, 36 L. Ed. 2d 702, 709 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-394 (1970). The rationale of those cases is equally applicable where, as here, the plaintiffs' action enforces important constitutional and statutory policies and thus benefits the public at large. Compare *Mills v. Electric Auto-Lite Co.*, 396 U.S. at 396.³⁹ As this Court indicated in *Newman*, any action which vindicates such policies serves, *ipso facto*, to "advance the public interest." 390 U.S. 400, 402.

The plaintiffs in this action sued to vindicate the right of all students to attend not black schools or white schools, but just schools, a national policy of the highest importance. Compare, *Brown v. Board of Education*, 397 U.S. 483, 493 (1954). This national policy has been embraced and advanced in major legislation. *Northcross v. Board of Education of the Memphis City Schools*, 41 U.S.L.W. 3635 (1973).⁴⁰ The achievement of this goal of integration of

³⁹ "[I]n vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders."

⁴⁰ Congress has expressly authorized the Attorney General to institute civil actions under appropriate circumstances to "further orderly achievement of desegregation in public education." 42 U.S.C. § 2000c-6. The use of force or threats of force to prevent any person from enrolling in or attending any public school because of his race has been made a federal crime. 18 U.S.C. § 245 (b)(2)(A). All federal agencies providing financial assistance to state schools have been directed by Congress to insure, by termination of funding or otherwise, that no person is excluded from

the public schools is vital to the public interest. It develops for the benefit of all the creative talents of students who might otherwise be relegated to an inferior education, it contributes to the skills, motivation and earning power of young men and women who might otherwise be destined for the burgeoning ghettos that blight our major cities, and it inculcates in students, teachers, parents and others in the community racial attitudes essential to the creation of a society in which blacks and whites work and live together in peace.

The plaintiffs who bring litigation of such national import should not be required to bear alone the cost of the ensuing public benefit. This Court has abandoned any suggestion that a private party lacks standing to sue where his interest is essentially the same as all his fellow citizens, *Flast v. Cohen*, 392 U.S. 83 (1968); a plaintiff should not be denied reimbursement for benefits conferred on others merely because the beneficiary is not a small and distinct group, but the public at large. In the instant case the funds of the defendant school board derive from taxes paid by residents of the area most immediately affected by this action.⁴¹ Assessing the cost of this action against such public revenues serves to pass on that cost to those who profited from it. *Hall v. Cole*, 36 L. Ed. 2d 702, 709 (1973).

participation in any such program on account of race. 42 U.S.C. § 2000d-1. On repeated occasions Congress has authorized grants and technical assistance to assist school boards in ending segregation. 42 U.S.C. §§ 2000e-2 *et seq*; Elementary and Secondary Education Act of 1966, P.L. 89-750, §181; Emergency School Aid Act of 1972, P.L. 92-318, Title VII.

⁴¹ A somewhat different situation would be presented where the defendant was a private person or organization, hence a beneficiary of the action but not necessarily able to pass on the cost of legal fees to all the other beneficiaries. This would be a circumstance relevant to, though not by itself controlling, the district court's decision as to whether special circumstances were present which rendered an award of counsel fees unjust. See p. 34, *infra*.

The award of legal fees was appropriate in *Mills and Hall*, not only because the litigation benefited the stockholders and union members involved, but because it benefited the corporation and union as well. See 396 U.S. 375, 396. That is not to say that the officials of the union or corporation supported the litigation or welcomed its results; the contrary was of course the case. Rather, Congress had defined the interests of corporations and unions by law in the Securities Exchange Act and the Labor-Management Reporting and Disclosure Act, respectively. In the instant case the school board is entirely a creature of the law; its only interest is in achieving the goals set by law in the manner also fixed by law. The particular desires of those who may sit on the board at any point in time, to the extent they are inconsistent with these goals and purposes, do not correspond to the legally cognizable interests of the board. Under the Constitution, the establishment of a unitary school system is as vital to the interests of the board as hiring instructors, teaching arithmetic, or providing students with books. An individual plaintiff who helps achieve any of these public goals through litigation is entitled to have his attorneys' fees paid by the defendant school board.

The power of the courts to award legal fees to a private attorney general conferring such a benefit on the public or the government derives, as in all common benefit cases, from the inherent equity power of the courts. See p. 21, *supra*. In the instant case the existence of that power is amply confirmed by the statutes under which this action is brought. The remedy authorized, 42 U.S.C. §1983; 28 U.S.C. §1343(3), is not simply damages or an injunction, but "redress" of deprivations of basic rights. This language constitutes the broadest possible authorization to the courts to fashion a just and effective remedy. It was to provide just such broad relief, in the face of inadequate state reme-

dies, that section 1983 was first enacted. *Monroe v. Pape*, 365 U.S. 167, 178 (1961). The term "redress" contemplates that the aggrieved plaintiff will be restored to the situation which would have obtained had his rights not been denied; such complete restoration ought include, in an appropriate case, compensation for the cost of attorneys' fees incurred that action for redress.

Courts of equity, in fashioning remedies to do complete justice, have traditionally created novel devices where the relief available at law proved inadequate for a new or unforeseen problem. When the general American rule against legal fees was first adopted, see *Arcambel v. Wisemam*, 3 U.S. (3 Dal.) 306 (1796), there were few if any federal statutes providing for the public weal which were susceptible of enforcement by private civil litigation, and in a country of only four million the resources of the federal government were adequate to the task of enforcing the few such laws which might exist. Since the turn of the century, however, the number of federal laws regulating private and government action for the good of the public has grown in an unprecedented fashion. Many of these laws are capable of private civil enforcement and, in a population of over two hundred million, not a few such laws can only be enforced by such private action. Similarly the decisions of this Court carrying out the provisions of the Constitution have spelled out many rights not readily capable of government enforcement, frequently because they are limitations on the powers of government itself.

In fashioning a remedy to deal with this problem, a court of equity could properly take cognizance of the injustice of using tax revenues only to defend government illegality, not to compensate those who prevent it. While the importance and cost of private civil actions to vindicate these public policies is often great, the financial gain to an indi-

vidual plaintiff is often *de minimis*. As the district court correctly observed:

... this sort of case is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class (something which must give pause to all attorneys, sensitive as is the profession to its ethical responsibilities) necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes. Coupled with the cost of proof is the likely personal and professional cost to counsel who work to vindicate minority rights in an atmosphere of resistance or outright hostility to their efforts. See *NAACP v. Button*, 371 U.S. 415, 435-36 (1963); *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968).

It is especially appropriate that the remedy devised be the award of counsel fees employed by recent statutory provisions protecting civil liberties, for such statutes should be treated "as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning. . . ." Stone, "The Common Law in the United States," 50 Harv. L. Rev. 4, 13-14 (1936); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 146 (5th Cir. 1971). The effective administration of justice in cases of this sort requires that the parties compete on a relatively comparable basis, lest the vast revenues of a public defendant be used to wear down without hope of reimbursement a private plaintiff of far more modest resources. It is well within the supervisory power of the courts to take steps necessary to put the parties on a more equal footing. Compare *Cheff v. Schrackenberg*, 384 U.S. 373, 380 (1966). The inherent power of the courts to enforce this Court's decisions in

Brown and Greene would mean little if the courts lacked the authority to enable private parties to bring violations of those decisions to their attention.

The authority of the courts to award legal fees to private attorneys general is of limited applicability, and does not entail a general abandonment of the well established American rule against awarding legal fees in civil cases. This authority does not extend to merely private disputes, but may be exercised only where the litigation benefits the general public or otherwise involves statutory or constitutional policy of unusual importance. It may be circumscribed by Congress, either expressly or by providing such detailed other remedies for violations of the right involved as to indicate a desire to preclude remedies not so enumerated. Compare *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). Even where, as here, this authority exists, it should not be exercised if there are special circumstances rendering an award of counsel fees unjust. Compare *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

In the instant case, however, no such special circumstances were present. It was therefore within the District Court's discretion to award plaintiffs counsel fees for having vindicated, as private attorneys general, the Fourteenth Amendment and the decisions of this Court.

IV.

The District Court Had the Discretion to Award Attorneys' Fees Because of the Conduct of the Defendant School Board.

The District Courts have inherent authority to award legal fees to a prevailing party because of the conduct of the opposing party. See *Newman v. Piggie Park Enter-*

prises, 390 U.S. 400, 402, n. 4. This discretion is properly exercised where the bringing of the action was compelled by the defendant's inexcusable defiance of the law, or by unreasonable conduct by the defendant in the course of the litigation once commenced. In the instant case the District Court expressly grounded its award of attorneys' fees on the conduct of the defendant school board, both before plaintiffs' motion for further relief, 133a-135a, and thereafter, 135a-137a. The decision of the District Court in exercising that discretion carries with it a strong presumption of correctness, and should only be overturned on appeal upon a clear showing that that discretion was abused. *Newton v. Consolidated Gas Co.*, 265 U.S. 78, 83 (1924). The award of legal fees in the instant case was well within the discretion of the District Court.

1. Conduct Prior to the Motion for Further Relief.

When plaintiffs moved on March 10, 1972, for further relief in this case, the defendant school board had for several years been operating the Richmond public schools in a manner plainly inconsistent with the decision of this Court. All the legal fees awarded by the District Court are directly attributable to this unlawful practice; had the school board acted on its own to comply with the clear command of this Court, no such fees would have been incurred by the instant plaintiffs. An award of attorneys' fees is required where "the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy or persistent defiance of the law." *Brewer v. School Board of the City of Norfolk, Virginia*, 456 F.2d 943, 949 (4th Cir. 1972).⁴²

⁴² See also, *McEnteggart v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971); *Horton v. Lawrence County Board of Education*, 449 F.2d 393 (5th Cir. 1971); *Monroe v. Board of Commissioners of City of Jackson*, 453 F.2d 259 (6th Cir.), cert. denied, 406 U.S. 945

The District Court's decision to award fees on this basis was clearly justified by the facts in this case. Since, moreover, the Court of Appeals reversed this award on the ground that the school board had no affirmative duty to act until brought into court, this case raises important questions regarding the responsibility of school officials to dismantle voluntarily dual school systems.

In March, 1964, the District Court in this case ordered the school board to implement a freedom of choice plan permitting black and white students to transfer to schools which had earlier been limited to pupils of the other race. Plaintiffs appealed that order, urging that the school board should be required to go beyond freedom of choice to a plan which would have actually resulted in a unitary school system. The Court of Appeals, however, affirmed the District Court's decision, 345 F.2d 310, and this Court declined to review that judgment by writ of certiorari. 382 103 (1965). The appellate proceedings, however, made it clear that the school board's legal responsibilities were not limited to implementing a freedom of choice plan. This Court directed the District Court to consider the impact of faculty segregation on the adequacy of any desegregation plans, expressly declined to approve the merits of the 1964 plan, and cautioned the defendants that delays in desegregating school systems were no longer tolerable. 382 U.S. at 105. Two of the five Fourth Circuit judges cautioned the school board that the plan should be reviewed and reappraised to see if it was working, and reminded it "that the initiative in achieving desegregation of the public schools must come from the school authorities." 345 F.2d at 322-324. On remand in 1966, the District

(1972); *Clark v. Board of Education of Little Rock School Dist.*, 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); 369 F.2d 661 (8th Cir. 1966); *Kelly v. Guinn*, 456 F.2d 100 (9th Cir. 1972).

Court directed the implementation of a plan based on freedom of choice. 17a-24a.

Two years later, on May 27, 1968, this Court unanimously condemned freedom of choice plans which did not have the effect, in fact, of dismantling the pre-existing dual school system. *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430. The Court expressly rejected the argument, relied on earlier by the Fourth Circuit in approving freedom of choice in Richmond, that a school board could completely discharge its constitutional obligations by merely "adopting a plan by which every student, regardless of race, may 'freely' choose the school he will attend." 391 U.S. at 437. Those obligations required that each State eliminate "root and branch" the racial identification of its schools which had arisen under State sponsored segregation. 391 U.S. at 435, 438. *Green* stated unequivocally that school boards could not sit idly by maintaining unconstitutional school systems until and unless litigation was commenced against them. 391 U.S. at 438-439.

The message of *Green* can hardly have been missed by the respondent school board. The Fourth Circuit panel reversed in *Green* was virtually the same as that which had earlier upheld Richmond's freedom of choice plan, the relevant opinions were written by the same judge, and the 1967 decision reversed in *Green* had relied on the earlier decision in this case.⁴³ New Kent County itself is located less than 15 miles from the City of Richmond. Dr. Little,

⁴³ *Green*, reported at 382 F.2d 338, was a per curiam decision relying on a decision the same day in *Bowman v. County School Board of Charles City County*, 382 F.2d 326 (4th Cir. 1967). The Fourth Circuit's earlier decision approving free choice in *Bradley* was cited at 382 F.2d 327, n. 2. Judges Haynsworth, Boreman and Bryan were in the majority in both *Bradley* and *Bowman*, joined in *Bowman* by Judge Craven who had been appointed subsequent to the 1965 *Bradley* decision.

the Associate Superintendent of Schools, indicated school officials were aware actually of the inadequacy of freedom of choice prior to the motion for further relief."

Despite the indisputable illegality of Richmond's freedom of choice plan under *Green*, and despite *Green's* command that school boards seize the initiative in meeting their constitutional responsibilities, the Richmond school board made no effort to change its system to comply with the law. When the school board had persisted in defiance of *Green* for almost two years, plaintiffs and their counsel were forced once again to assume the burdens of protracted litigation to gain the constitutional rights to which they were clearly entitled. Upon being brought back into court by plaintiffs in March of 1970, the board conceded, after some equivocation, the illegality of the system it had been operating for nearly two years in defiance of *Green*.⁴⁵

"In July of 1969, the school board commenced planning for the acquisition of sites for several new schools in an area to be annexed from Chesterfield County, and purchased several sites over the year that followed. In connection with questions as to how these sites were chosen, the following dialogue occurred:

THE COURT: Dr. Little, do you recall any conversation or any suggestion that perhaps the [Richmond] freedom of choice plan would have to be changed by virtue of the United States Supreme Court decision prior to the acquisition of these sites. Did you hear anybody say anything about it or do you think the assumption was you ought to go on under the plan that you had because you felt it was a valid plan?

THE WITNESS: Your Honor, we have discussed it. We had some serious problems with freedom of choice, freedom of choice plan.

Hearing of June 19, 1970, 37a.

⁴⁵ On March 12, 1970, the District Court ordered the defendants to state whether they maintained the Richmond schools were being run in accordance with the Constitution. On March 19 the defendants filed a statement that they "had been advised" the school system was not a unitary one. 28a. On March 31, after the District Court inquired whether this advice had been accepted, the school board conceded that the school system was operating in a manner contrary to constitutional requirements. 317 F. Supp. 558; 30a.

The District Court based its award of legal fees in large measure on the failure of the school board for almost two years to satisfy its affirmative obligation under *Green*. In its opinion awarding these fees the District Court explained:

It should be apparent that since 1968 at the latest the School Board was clearly in default of its constitutional duty. * * * Because the relevant legal standards were clear it is not unfair to say that the litigation was unnecessary. It achieved, however, substantial delay in the full desegregation of city schools. Courts are not meant to be the conventional means by which person's rights are afforded. The law favors settlement and voluntary compliance with the law. When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes.

It is no argument to the contrary that political realities may compel school administrators to insist on integration by judicial decree and that this is the ordinary, usual means of achieving compliance with constitutional desegregation standards. If such considerations lead parties to mount defenses without hope of success, the judicial process is nonetheless imposed upon and the plaintiffs are callously put to unreasonable and unnecessary expense. 133a-134a.⁴⁶

⁴⁶ The District Court had taken a similar position throughout the proceedings. At the hearing of June 26, 1970, the court remarked, "We have had several years, and I will not dwell on it, but it has been several years since the New Kent case and nothing has been done. Nothing seems to be done until somebody comes in and creates litigation." 62a. On August 7, 1970, the court commented, "[T]he School Board, who has known since May 27, 1968, that freedom of choice was not constitutionally viable unless it works,

The Court of Appeals did not disturb the District Court's findings of fact regarding the school board's conduct prior to plaintiffs' 1970 motion for further relief. Nor did the Fourth Circuit question the rule applied by the District Court that legal fees should be allowed where a school board forces private citizens to resort to litigation to vindicate their clear right to a unitary school system. Rather, the appellate court excused the failure of the defendants to dismantle an admittedly illegal dual school system because (1) the school board had received no complaints from plaintiffs or others, and (2) the school board faced "vexing uncertainties in framing a new plan of desegregation." 161a-167a.

For almost two decades this Court has admonished school boards to seize the initiative in bringing their systems into compliance with the Constitution.⁴⁷ The cautious pace of

wait[ed] for two years to come into court. After they are brought into court they stand up and admit it did not work." 79a. On February 16, 1971, the court insisted it would in the near future order into effect a new plan, despite the practical problems involved. "I have come to the conclusion that I must enter an order, preferably by April 1, and the school board just has to do the best they can. I am sorry. I don't mean to put it that way, but this matter in 1967 [sic], everybody knew what they had to do. All you had to do was read the law. Nothing was done. You can't go on and on and on." 100a.

⁴⁷ In *Brown II* the Court stated that full implementation of the constitutional principles enunciated in *Brown I* might "require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems." 349 U.S. at 299. (emphasis added) In *Cooper v. Aaron*, the Court explained that under *Brown II* school authorities were "duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." 358 U.S. 1, 7 (1952). In *Green v. County School Board of New Kent County* the Court reaffirmed that school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary school system in which racial discrimination would be eliminated root and branch. . . . [I]t was to this end that *Brown II* commanded school boards to bend their efforts . . . The burden on

"all deliberate speed" announced in *Brown* has long since given way to a call for immediate action.⁴⁸

If the standards applied by the Fourth Circuit in excusing the school board's two year delay were accepted by this Court, there would be virtually no circumstances under which a school board would have an affirmative obligation to act. Few students or parents without the assistance and protection of counsel will brave the community pressures against those who protest segregation. Compare *Green v. County School of New Kent* (1968). Virtually any school district will be able to claim that, in view of the complex problems of pupil assignment, transportation, school construction and financing, it, like the Richmond school board, could not foresee the precise plan which would be approved by the courts if litigation were commenced. Compare *Swann v. Board of Education*, 402 U.S. 1 (1971). But whatever "uncertainties" existed before or after *Swann* were as to the tools which the courts could use when state officials failed to comply with the law. The tools available to school officials themselves are limited only by their imagination and practical considerations; school boards have always been free to

a school board today is to come forward with a plan that promises realistically to work and promises U.S. at 437-439 (1968); see also *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

⁴⁸ In 1963 and 1964 this Court announced that the context which surrounded the standard of *Brown v. Board of Education*, 373 U.S. 683, 689 (1963); *Calhoun v. Latimer*, 377 U.S. 218, 234 (1964). Seven years ago, in this very case, the Court declared, "Delays in desegregation have long since changed. *Goss v. Board of Education*, 377 U.S. 683, 689 (1963); *Griffin v. School Board of Charlotte-Mecklenburg*, 397 U.S. 103, 105 (1965). The command in *Green* for integration now has been reiterated in subsequent decisions. *Alexander v. Holmes*, 396 U.S. 19, 20 (1969); *Swann v. Board of Education*, 402 U.S. 1, 13-14

adopt any techniques which worked, even though some might be beyond the power of the federal courts to order. Compare *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971). The goal to be achieved has always been clear—the creation of a unitary school system. Compare *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). Any uncertainty on the part of the board as to how to achieve a unitary system cannot excuse the board's decision not to try to achieve such a system at all.

It has never been claimed, and no court has ever held, that the *actual* reason the school board took no action in the face of *Green* in 1968 was that it had no complaints or did not know what to do. The school board never asserted that it spent the 22 months after *Green* trying to formulate a new desegregation plan; once litigation commenced, the board was able to devise its first proposed plan in 41 days, and its second in 27. On the contrary, District Court found that the general attitude of the authorities was that they would take no steps to establish a unitary school system except under court order. 133a. The only excuse actually offered by the school board for failing to act after *Green* was that it was complying instead with the 1966 court order authorizing a freedom of choice plan.⁴⁹ The notion that the

⁴⁹ Brief for Appellants, p.21. At the hearing of August 7, 1970, the following dialogue occurred between the Court and counsel for the school board.

THE COURT: . . . [T]he School Board, who has known since May 27, 1968, that freedom of choice was not constitutionally viable unless it works, wait for two years to come into court. After they are brought into court they stand up and admit it did not work.

MR. MATTOX: The School Board was operating a system under the direction of this Court.

THE COURT: But they knew that that was no longer valid.

MR. MATTOX: But it was still operating, Your Honor, as—

THE COURT: You mean they were using the technical aspect; is that it?

school board could evade responsibility for obeying *Green* by complying instead with a lower court decision preceding and inconsistent with *Green* is completely at odds with the standards of scrupulous obedience of the law demanded of any government agency.

Moreover in the instant case the school board was in violation of the 1966 decree itself. The 1966 plan went beyond mere freedom of choice in several respects. First it required, pursuant to the order of this Court, that the board end existing racial segregation of faculty and assign faculty and other staff so that no school was identifiable as intended for students of a particular case.⁵⁰ Yet in 1970 the District Court discovered that 45 of 66 schools had faculty and staff in excess of 90% white or 90% black. 338 F. Supp. 67, 72; see also 317 F. Supp. 555, 560-561. It further found that "[u]nder the freedom of choice plan governing Richmond's schools through 1969-70, the faculties of many schools were plainly segregated. This fact, stand- and in all probability it also impaired the process of student ing alone, contributed to the racial identifiability of schools, body segregation by personnel initiative." 325 F. Supp. 828, 838. The Superintendent of Schools conceded that the board had never actually required teachers to work at a particular school in order to achieve faculty integration.⁵¹

MR. MATTOX: No, sir, they were following the directive of this Court.

THE COURT: In spite of the fact that they knew that that was no longer the law, Mr. Mattox, really?

MR. MATTOX: Your Honor, the law—any School Board apply this as the law under the order that was issued in this case. Whether the law had changed or not is beside the point. It was not the law in this case at that time.

79a.

⁵⁰ 20a-21a.

⁵¹ At the hearing of June 19, 1970, Dr. Adams testified, "We have used all the means that we know how during the past four years to get teachers to move from one school to another *short of* making it a condition of employment" 49a (Emphasis added).

Second, the 1966 decree directed that school construction not be designed to perpetuate, maintain, or support racial segregation.⁵² Yet in 1970 the District Court found

"School construction policy has contributed substantially to the current segregated conditions. Schools have been built and attendance policies maintained so that, even *within* existing school divisions and by comparison with the racial ratios prevailing therein, new or expanded facilities were racially identifiable. The evidence shows that this was purposeful, its immediate and intended result was the prolongation and attempted perpetuation of segregation *within* school divisions." 338 F. Supp., 86 (emphasis added).

Most significantly, the plan provided that it must be evaluated "in terms of results," and that if the steps taken by the school board did not produce "significant results . . . the freedom of choice plan will have to be modified with consideration given to other procedures such as boundary lines in certain areas."⁵³ Four years later the court concluded "there was generally little change in the racial composition of the schools from the inception of the freedom of choice plan" to 1970. 317 F. Supp. 555, 561. Three of seven high schools were more than 90% black. Of nine middle schools, 3 were over 99% black and 3 were over 90% white. There were 17 all black elementary schools, and another 4 over 99% black, with 15 elementary schools over 90% white. 317 F. Supp. 555, 571-72.

In view of the fact that the defendant school board had for several years been in open and inexcusable violation of both *Green* and the 1966 court order, and had thus compelled the plaintiffs to pursue further litigation to obtain rights to which they were clearly entitled, the District

⁵² 23a.

⁵³ 22a-23a.

Court plainly had the discretion to award plaintiffs attorneys' fees.

2. *Conduct After the Motion for Further Relief.*

Since the defendants' obdurate refusal to afford plaintiffs their constitutional rights forced them to initiate the litigation of 1970-71, plaintiffs would have been entitled to compensation for the ensuing legal fees even if the school board's conduct, after being brought back into court, had been exemplary. After initially conceding that its freedom of choice plan was illegal and that plaintiffs were entitled to further relief, the school board proposed five desegregation plans—one in May 1970, one in July 1970, and three in January 1971. The District Court rejected both the May and July submissions as inadequate, but accepted the July plan as an interim measure so that schools could open in September. The court found two of the three January plans also deficient, and adopted the third, under which Richmond is now operating. The legal services for which the District Court awarded attorneys fees were expended largely in opposing the inadequate school board plans of May and July,⁵⁴ and the award was grounded, *inter alia*, on the unreasonableness of the school board in proposing such "additional relief" as was manifestly inadequate.⁵⁵

The first plan offered by the school board was one prepared by the Department of Health, Education and Welfare ("HEW") and modified only insignificantly by the board. This was a neighborhood school plan devised by simply assigning students to the school nearest them with-

⁵⁴ The District Court's award dealt only with services performed before January 29, 1971. 141a. Virtually all the services in this period were performed between the filing of the motion for further relief in March and the rejection of the second plan in August. 94a-95a.

⁵⁵ See 135a-137a.

out regard to the resulting racial composition of the schools or the extent to which the pre-existing dual school system was dismantled. The plan had at best a minimal impact on the pattern of racially identifiable schools established by the board before *Brown* and perpetuated by freedom of choice. The school board proposed that there be 20 schools with at least 90% black students, 19 schools with at least 70% white students, and only 14 schools between these two extremes.⁵⁶ After almost three months had been expended in the preparation and analysis of this plan—a crucial period since the new school year was fast approaching—and after counsel for plaintiffs had expended substantial efforts in opposing a plan which would have largely defeated their request for additional relief, the District Court rejected this plan for continued segregation of the Richmond schools as “[u]tterly ridiculous.”⁵⁷

The school board cannot escape liability for legal fees caused by the proposal on the ground that it was prepared by HEW. As the District Court pointed out and counsel for the board conceded, the responsibility for proposing an effective plan of desegregation was the board's, not HEW's.⁵⁸ While under many circumstances it may be constructive for a school board to turn to HEW for assistance in preparing such a plan, that was manifestly and foreseeably not the situation in this case. As was well known to the school board, black and white school children were not evenly distributed throughout the city, but were grouped in residentially segregated areas, and under the illegal freedom of choice plan generally attended the school nearest their home which was, in most cases, either overwhelmingly black or overwhelmingly white. At the very

⁵⁶ Transcript of Proceeding of June 29, 1970, 59a-61a, see 317 F. Supp. 555, 564-65.

⁵⁷ Transcript of Proceeding of June 26, 1970, 57a-62a.

⁵⁸ Transcript of Proceedings of June 19, 1970, 49a.

time that the school board proposed to seek the assistance of HEW in preparing a plan of desegregation, that Department was under instructions from the administration to make the "neighborhood school" the basis of any proposed plan, and not to employ transportation of pupils "beyond normal geographic school zones." Public Papers of the Presidents: 1970, pp. 112-113 (February 16, 1970), 315 (March 24, 1970). If, as seems inconceivable, the school board was unaware of HEW's policies when it first proposed seeking its assistance, that was no longer the case after March 31, 1970 when, in conference with the District Court, plaintiffs' counsel expressed his grave reservations at this proposal in the light of the administration's position.⁵⁹

Despite this warning, the school board persisted in asking that HEW prepare a plan. The board expressed no concern to HEW over the policies announced by the administration, and made no request that they be ignored in preparing its recommendations.⁶⁰ During the weeks that HEW was preparing its recommendations, the school board, despite ample resources, made no effort to draft any proposals of its own. Whatever illusions, if any, the board may have had as to HEW's intentions were necessarily dispelled when the HEW plan was received in early May. At that point the school board, which had early conceded to the court that it would not be bound by HEW's recommendations,⁶¹ knew full well that the HEW plan meant a continuation of racially identifiable schools throughout the city. Had the board desired in good faith to dismantle Richmond's dual school system, it would have reported to the court the inadequacy of the HEW plan and asked for additional time to prepare a new plan of its own.

⁵⁹ Transcript of Proceedings of March 31, 1970, 33a.

⁶⁰ Transcript of Proceedings of June 19, 1970, 45a.

⁶¹ Transcript of Proceedings of March 31, 1970, 33a.

Such a step would have avoided the substantial delay and many unnecessary hours of plaintiffs' counsel's time necessitated by insisting on litigating the merits of a manifestly inadequate proposal. Instead the school board, without considering any alternatives,⁶² approved the HEW plan and submitted it to the court.

After the board had submitted this plan to the court, and while plaintiffs were at work preparing their response, the Fourth Circuit handed down its decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 138 (May 26, 1970). *Swann* held that school boards which had operated a dual system must "use all reasonable means to integrate the schools in their jurisdiction," including busing, non-contiguous zoning and clustering. 431 F.2d at 142-143. If there was ever any doubt as to the invalidity of the HEW plan, and plaintiffs insist there was not, surely those doubts were extinguished by *Swann*. Had the board, in the face of *Swann*, moved with dispatch to withdraw the HEW plan and prepare a new one, further delay would have been avoided and considerable effort by plaintiffs' counsel would have been unnecessary. Instead, the board insisted on advocating the HEW plan in the teeth of *Swann*. Despite *Swann's* command "all reasonable efforts be made to integrate every school," the school board offered one witness that a unitary school system was achieved by any assignment plan that did not consider the race of the children,⁶³ and a second who testified that a desegregated school in any school in which "[t]here is at least one legally definable Negro in an otherwise all-white school or there is at least one definable white in an otherwise all-Negro school . . ." ⁶⁴ Despite the fact that *Swann* approved

⁶² Transcript of Proceedings of June 19, 1970, 41a.

⁶³ *Id.* 50a.

⁶⁴ Transcript of Proceedings of June 19, 1970, p. 173.

the decision of the district court in that case rejecting a plan for elementary school desegregation because it was based on contiguous geographical zoning and thus left large numbers of virtually all-black or all-white schools, the board's witness testified that the board's proposal was prepared subject to the same limitation.⁶⁵ Despite Swann's ruling that busing was one of the reasonable means which was to be used if necessary to achieve integration, the board's own witness further conceded that additional transportation was not considered in preparing the board's plan.⁶⁶ Despite the holding in *Swann* that further steps were to be taken if some schools remained segregated because of residential patterns, 431 F.2d at 147, the board's witness testified that the residential patterns of Richmond were not considered in the plan still supported by the board.⁶⁷ Indeed, not even the race of the children in each school under the plan had been considered.⁶⁸ Although *Swann* disapproved as ineffectual a plan for elementary schools which left about half the black students in nearby segregated schools, 431 F.2d at 146, counsel for the school board conceded its plan would leave over 50% of the black students in schools over 95% black.⁶⁹

Whatever the board's motives may have been when it first solicited the assistance of HEW in March of 1970, the District Court's statement welcoming "help" from any source⁷⁰ did not authorize the board to delegate its entire responsibility to submit a plausible plan of desegregation

⁶⁵ *Id.* 44a. See also pp. 122, 177.

⁶⁶ *Id.* 44a-45a. See also pp. 97, 138 *et seq.*

⁶⁷ *Id.* p. 91.

⁶⁸ *Id.* pp. 107-108.

⁶⁹ *Id.* p. 103.

⁷⁰ Transcript of Proceedings of March 31, 1970, 32a.

to any other government agency, least of all one committed to a policy of rigidly adhering to neighborhood schools even where, as in Richmond, that policy perpetuated a dual school system. The board's decision to submit the inadequate HEW plan to the court, and to stubbornly advocate that plan even after *Swann*, contributed nothing to the fashioning of appropriate relief, and served only to delay that process and to place additional burdens on plaintiffs' counsel. The award of attorneys fees for the work required of such counsel by reason of the board's conduct was well within the discretion of the District Court.

Following the rejection of the HEW plan, the school board was directed to prepare a new plan for operation of the schools in the 1970-71 school year, to be considered over the summer. Under the plan proposed by the board two of the seven city high schools remained racially identifiable, as did certain of the middle level schools.⁷¹ Most significantly, 12 of the elementary schools were more than 90% black and seven of them more than 90% white.⁷² In *Swann* the Fourth Circuit had expressly held inadequate a plan submitted to the district court in that case which left about half the white and black elementary school pupils in schools that were nearly completely segregated. 431 F.2d 138, 146. Despite this clear holding, the Richmond school board proposed two months later that 8,814 of 14,963 black elementary pupils be in schools over 90% black, and 4,621 of 10,296 white elementary students be in schools over 90% white.⁷³ The District Court rejected this proposal as a final plan, but adopted it as an interim measure so that the schools could open in September. 317 F. Supp. 555, 575-6.

⁷¹ 317 F. Supp. 555, 573.

⁷² 118a.

⁷³ 118a.

The school board urged below that its conduct in proposing these two unacceptable plans was not unreasonable in view of the confusion that existed as to what tools might be required by law.⁷⁴ In fact, however, the Fourth Circuit had made clear in *Swann* a month before the hearing on the HEW plan that a school board "must use all possible means to integrate the schools in their jurisdiction," 431 F.2d at 138, including, *inter alia*, busing and satellite zoning. 431 F.2d 145. The school board cannot have failed to understand its duty, even before *Swann*, to eliminate racially identifiable schools; a goal neither achieved nor even approached by these plans.

The legal services performed by plaintiffs would never have been required if, as might have been hoped, the school board had proposed a constitutionally adequate plan in May of 1970, instead of January of 1971. Doubtless there were methods of obstruction to which the defendant did not resort, and at a later stage in the litigation the defendant assumed a significantly more constructive attitude, but these are factors of which the District Court was cognizant when it concluded that legal fees should be awarded in this case. At the stage of the proceedings when the legal services at issue were performed, each move by the board in the agonizingly slow process of desegregation was taken "unwillingly and under coercion." 338 F. Supp. 67, 103. The fee awarded plaintiffs' counsel was substantially less than that paid out of tax funds to counsel for the school board.⁷⁵ Under the circumstances the decision of the District Court to award attorneys' fees cannot be said to have been an abuse of discretion.

⁷⁴ Brief for Appellants, p. 25.

⁷⁵ See Letter of Counsel for the School Board, dated March 11, 1971, 102a-104a.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

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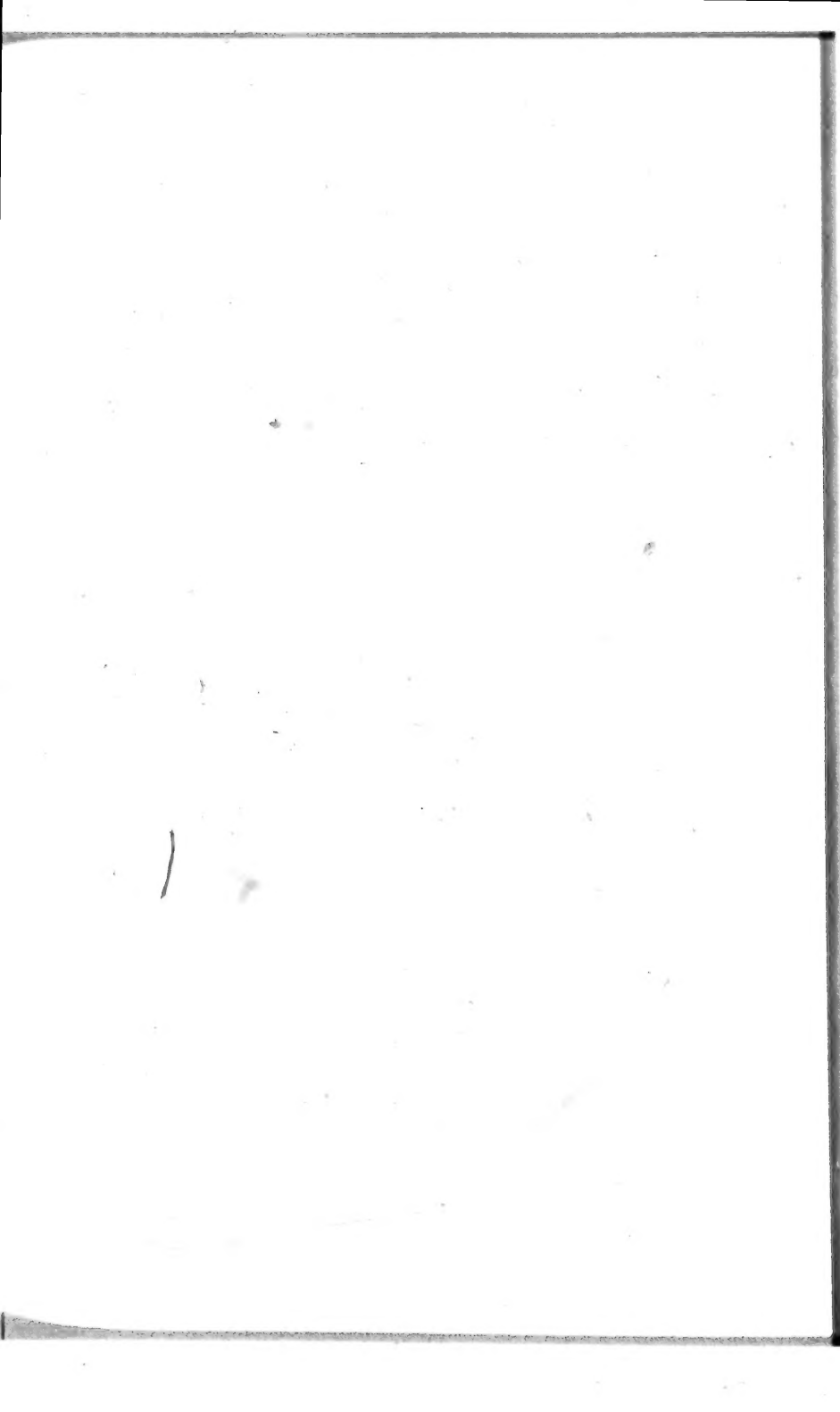
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SUPREME COURT, U. S.

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IN THE
Supreme Court of the United States

October Term, 1973

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

v.

THE SCHOOL BOARD
OF THE CITY OF RICHMOND, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is set out in the Appendix (160a-203a). The opinion of the Court of Appeals in the companion case, *Thompson v. School Board of City of Newport News*, is reported at 472 F.2d 177 and is set out in the Appendix to the Petition for Writ of Certiorari (78a-81a).

QUESTION PRESENTED

Was the Court of Appeals justified in setting aside the award of attorneys' fees in this school desegregation case?

STATEMENT

The question before this Court is solely concerned with the propriety of the action of the Court of Appeals in setting aside an award by the District Court of the Petitioners' fees, costs and expenses in the amount of \$56,419.65 for the period of approximately 11 months from March 10, 1970, to January 29, 1971, in the Richmond school desegregation case (53 F.R.D. 42, 113a; 472 F.2d 320, 160a).

On March 10, 1970, the Petitioners filed a motion for further relief in the case to which was appended an application for an award of reasonable attorneys' fees to be paid by the Richmond School Board. After approving, on an interim basis, the School Board's Plan for the desegregation of city schools for 1970-71,¹ the District Court on January 29, 1971, denied Petitioners' request for mid-year implementation of a more extensive desegregation plan.² Following its acceptance of another School Board plan for the 1971-72 session,³ the District Court entered its opinion and judgment ordering the School Board to pay the award in question (53 F.R.D. 28; 113a-145a).

At the time of District Court's order, all appeals courts which had considered the precise question had agreed that

¹ Bradley v. School Bd. of City of Richmond, 317 F.Supp. 555 (E.D. Va. 1970).

² Bradley v. School Bd. of City of Richmond, 324 F.Supp. 456, 457-61 (E.D. Va. 1971).

³ Bradley v. School Bd. of City of Richmond, 325 F.Supp. 828 (E.D. Va. 1971).

the standard under which a court in the exercise of its equitable discretion could award counsel fees in school desegregation cases required findings of an "extraordinary" situation where a defendant school authority had persisted in a continuing pattern of "unreasonable, obdurate obstinacy" or defiance of the law.⁴

The District Court based its award both on findings that the School Board had indeed exhibited the required obduracy in the face of clear legal demands (53 F.R.D. 30-33, 39-41; 113a-121a, 133a-137a); and, as an alternative ground, that "by reason of the unique character of school desegregation suits, justice require[d] that fees should be awarded" (53 F.R.D. 30, 41-42; 114a, 137a-140a).

In reversing the lower Court's order, however, the Court of Appeals found that neither ground sustained the award (472 F.2d 320; 161a) since the District Court's finding of "obdurate obstinacy" was erroneous in that it was not supported by the record (472 F.2d 320-27; 166a-177a), and that since the authorization of such awards as a means of implementing public policy was a matter for legislative rather than judicial discretion (472 F.2d 328-31; 179a-186a), the lower Court had further erred in not adhering to the traditional equitable standard which the Appeals Court had been applying for nearly a decade (472 F.2d 331; 186a).

After the Court of Appeals had reached the foregoing conclusions but before it had issued its opinion (472 F.2d

⁴ *E.g.*, *Williams v. Kimbrough*, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); *Rolfe v. County Bd. of Educ.*, 391 F.2d 77, 81 (6th Cir. 1968); *Kemp v. Beasley*, 352 F.2d 14, 23 (8th Cir. 1965); *Bradley v. School Bd. of City of Richmond*, 345 F.2d 310, 321 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965); *Bell v. School Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963).

331; 186a), Congress enacted Section 718 of the Education Amendments Act of 1972⁵ (P. Br. 2-3), which expressly authorizes awards of reasonable attorneys' fees in school desegregation cases under enumerated conditions. Under the terms of this Act, Section 718 became effective on July 1, 1972.⁶

The Petitioners alerted the Court of Appeals as to the enactment of Section 718 and urged that it authorized the award made by the lower Court for services rendered prior to the effective date of the new statute (472 F.2d 331; 186a). The Appeals Court withheld the opinion it had previously prepared in this case and conducted an *en banc* hearing to determine the applicability of Section 718 in this as well as in other cases then before it⁷ (472 F.2d 331; 186a-187a). Questions pertaining to the applicability of Section 718 were thoroughly briefed including a specific consideration of its legislative history to ascertain if retro-active operation might have been intended by Congress.

Following full argument, the Court of Appeals concluded its opinion in this case by holding that Section 718 by its

⁵ Pub. L. No. 92-318, 86 Stat. 235. Section 718 is a part of the "Emergency School Aid Act" which comprises Title VII of the Education Amendments Act of 1972 and which is codified at 20 U.S.C.A. §§ 1601-1619 (Cum. Supp. 1973). See also, 1 U.S. CODE CONG. & AD. NEWS 278, 421-42 (92d Cong. 2d Sess. 1972).

⁶ Under the "general provisions" portion of the Education Amendments Act of 1972, Section 2(c)(1) provides in part as follows: "Unless otherwise specified, each provision of this Act and each amendment made by this Act shall be effective after June 30, 1972. . . ." See 1 U.S. CODE CONG. & AD. NEWS *supra* at 279.

⁷ See *Thompson v. School Bd. of City of Newport News*, 472 F.2d 177 (4th Cir. 1972) (Per Curiam) and companion cases (Pet. A. 78-81).

own terms was inapplicable in the first instance⁸ (472 F.2d 331-32; 187a-188a) and even if applicable, it did not reach legal services rendered prior to its effective date (472 F.2d 331; 187a).⁹

SUMMARY OF ARGUMENT

The decision of the Court of Appeals should be affirmed unless this Court determines that (1) Section 718 of the Emergency School Aid Act of 1972 does apply to legal services rendered prior to July 1, 1972, or if not, that (2) a standard not previously adopted in any circuit or by any other district court in a school desegregation case should be applied to such services, or that (3) the Appeals Court erred in finding that the record failed to support the conclusion of the District Court that a pattern of bad faith on the part of the Richmond School Board justified the award under the traditional equitable standard.

1. Application of the cardinal rule of statutory construction, that legislation must be given only prospective effect absent clear legislative intent to the contrary, dictates that Section 718 be applied only to those legal services performed on or after July 1, 1972, its effective date. The legislative history of Section 718 is devoid of any intention on the part of Congress to create any new standard applicable to legal services rendered prior to July 1, 1972, or

⁸ The Appeals Court reasoned that "there was no 'final order' pending unresolved on appeal" when Section 718 became effective and that Section 718 could not therefore be applied irrespective of *when* the legal services in question were rendered (472 F.2d 331-32; 187a-188a).

⁹ See *Thompson v. School Bd. of City of Newport News*, 472 F.2d 177, 178 (4th Cir. 1972) (Per Curiam) (Pet. A. 79-80).

that it intended to promote the extensive additional litigation which would be necessary if there were any re-examination of the issue of attorneys' fees in the multitude of desegregation cases which by their nature are still pending. This conclusion as to the inapplicability of Section 718 to services rendered prior to July 1, 1972, is totally consistent with the teachings of *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969) and *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), that an appellate court should apply an intervening law "*which positively changes the rule which governs.*" *Schooner Peggy*, *supra* at 110. Under these authorities, whether Congress intended to cover pre-July, 1972 legal services remains the threshold inquiry.

2. Since Section 718 is not applicable to the services in question, the next inquiry is whether the traditional equitable standard, *i.e.*, the conduct-oriented test, uniformly applied for over a decade should be replaced now by a less restrictive judicially-invoked standard. Three considerations strongly militate against the appropriateness of such action at this time.

The unique character of school desegregation cases in general, and specifically, the largely unsettled state of the law prior to this Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), afford a sound basis for the uniform application of the conduct-oriented standard as governing awards of attorneys' fees in school desegregation actions where the legal services were rendered prior to July 1, 1972. The significant pre-*Swann* uncertainties renders the reasoning of this Court and others in fashioning less restrictive standards for awards of attorneys' fees in other civil rights cases inappropriate as a mea-

sure of an urban school board's efforts in seeking to implement a unitary system of schools prior to the time when the precise methods for doing so were delineated.

Further, the consistent application of the conduct-oriented standard to legal services rendered prior to July 1, 1972, by all courts of appeals coupled with the congressional enactment of Section 718 renders the development of any new judicial standard at this time inappropriate and inconsistent with the exercise of sound judicial discretion. Moreover, the adoption of a new judicial standard to apply to legal services rendered prior to July 1, 1972, would foster a significant amount of additional litigation, and would place an onerous burden on the many school authorities who undertook good faith defenses of school desegregation actions prior to the time when legal requirements became sufficiently clear.

3. The final question to be resolved is whether the Court of Appeals correctly concluded that the District Court's findings of obdurate obstinacy on the part of the School Board were made largely through the application of hindsight and were thus erroneous. The propriety of the Court of Appeals' action can best be demonstrated by a comparison of the lower Court's findings of bad faith in its May 26, 1971 opinion with the same Court's comments and views expressed at the precise time the events in question were occurring. Such a comparison can only lead to the conclusion that the District Court's findings on May 26, 1971 were totally inconsistent with its own contemporaneous evaluation of the School Board's action and were simply not supported by the record. When the action of the School Board is properly viewed in its totality in light of the facts, circumstances and controlling law then prevailing, it is clear that its conduct fell far short of the required pattern

of obstruction or obdurate obstinacy in the face of well-defined legal demands.

ARGUMENT

Introduction

Three categorical statements may be made regarding the current state of the law governing awards of attorneys' fees to successful plaintiffs in school desegregation actions:

First, prior to the enactment of Section 718 of the Emergency School Aid Act of 1972, there was complete unanimity among all the courts of appeals which had considered the precise question that an award of attorneys' fees was appropriate only in those extraordinary situations where a school board had persisted in a continuing pattern of evasion, obstruction or obdurate obstinacy in the face of clear legal requirements.

Secondly, this Court in *Northcross v. Board of Education of Memphis*, U.S., 93 S.Ct. 2201, 2202 (1973) (Per Curiam) relying substantially on an earlier opinion of the United States Court of Appeals for the Fifth Circuit in *Johnson v. Combs*, 471 F.2d 84 (5th Cir. 1972), *re-hearing and rehearing en banc denied*, 472 F.2d 1405 (5th Cir. 1973), established that for legal services rendered on or after July 1, 1972, Section 718 requires federal courts to award attorneys' fees to successful plaintiffs unless special circumstances are found which would render such an award unjust.

Finally, the only two courts which have had occasion to rule on the applicability of Section 718 to services rendered prior to its effective date, the Court of Appeals below and the Fifth Circuit in *Johnson, supra* and later in *Henry v. Clarksdale Municipal Separate School District*, 480 F.2d

583 (5th Cir. 1973), have refused to apply Section 718 *or* the standard embodied therein to services performed prior to July 1, 1972.

Three considerations attest to the propriety of the Court of Appeals' decision: Section 718 is inapplicable to legal services rendered prior to July 1, 1972; the exercise of sound judicial discretion dictates that no new judicial standard should be invoked at this date to apply to pre-July 1, 1972 services; and the Appeals Court was required to set aside the lower Court's order as the record herein failed to support an award under the traditional equitable standard.

I.

THE AWARD OF ATTORNEYS' FEES HERE IN QUESTION CANNOT BE SUSTAINED UNDER SECTION 718 OF THE EMERGENCY SCHOOL AID ACT OF 1972.

The order of the District Court required the School Board to pay all of the Petitioners' fees, costs and expenses incurred during the period from March 10, 1970, to January 29, 1971 (53 F.R.D. 42, 113a; 472 F.2d 320, 160a). The terminal date is significant in that on that same date the lower Court entered an opinion and order denying Petitioners' motion for mid-year relief.¹⁰ The plan under which the School Board is currently operating was the result of a District Court order entered April 5, 1971,¹¹ from which no appeal was taken. The award in question was made pursuant to a decree entered by the lower Court on May 26,

¹⁰ Bradley v. School Bd. of City of Richmond, 324 F.Supp. 456 (E.D. Va. 1971).

¹¹ Bradley v. School Bd. of City of Richmond, 325 F.Supp. 828 (E.D. Va. 1971).

1971, more than a year prior to the time Section 718 of the Emergency School Aid Act of 1972 became effective on July 1, 1972.

The Petitioners now contend that even though Section 718 was enacted nearly a year and a half subsequent to the performance of the last legal services for which the District Court awarded attorneys' fees, the statutory authorization is fully applicable in this and indeed "in all cases in which the question of attorneys' fees has not been finally resolved before July 1, 1972" (P. Br. 21). Petitioners' argument is predicated on two principal grounds, *i.e.*, that the legislative history of Section 718 compels such retroactive application (P. Br. 15-21), and alternatively, that this Court in *Thorpe*, *supra* modified the normal rule of prospective application regarding the applicability of changes in the law to pending cases (P. Br. 11-15).

The fallacy of both positions is demonstrated by a brief review of the general rule of statutory construction governing the applicability of legislative enactments to past or future events, a review of the legislative history of Section 718 and a showing that the rule first enunciated by this Court in *Schooner Peggy*, *supra*, and later in *Thorpe*, *supra* in no way operates to diminish or limit the applicability of the general rule of construction.

The general rule that legislative enactments only operate prospectively absent clear legislative intent to the contrary cannot be seriously questioned. As this Court reaffirmed in *Greene v. United States*, 376 U.S. 149 (1964), in refusing to apply an administrative regulation retrospectively,

[t]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to the statute which interferes with antecedent rights

... unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Id. at 160, citing *Union Pacific Railroad Company v. Laramie Stock Yards Company*, 231 U.S. 190, 199 (1913) (footnote omitted).

Significantly the United States Court of Appeals for the Fifth Circuit in specifically refusing to apply Section 718 to legal services rendered prior to July 1, 1972, relied on "the long-established presumption against retrospective application in the absence of a clear legislative intent..." *Johnson, supra* at 86.

It is thus apparent that the initial inquiry which this Court must make necessarily involves an examination of the legislative history surrounding the enactment of this particular statute in order that the intent of Congress might be gleaned as to whether or not the statute was meant to attach to legal services performed prior to its effective date. Furthermore, under the authority of *Greene, supra*, this Court must presume that Section 718 was intended only to operate prospectively unless there is a clear demonstration that Congress unequivocally intended that it should apply to legal services rendered prior to July 1, 1972.

At the outset, it should be recalled that this precise question was thoroughly briefed in the Appeals Court below, and a majority of that Court concluded in the companion case, *Thompson v. School Board of City of Newport News*, 472 F.2d 177, 178 (4th Cir. 1972), as follows:

... only legal services rendered after the effective date of §718 are compensable under it. [The majority] invoke the principle that legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the statute ap-

plied in that manner. [The majority] do not find such an intention . . . and there is no affirmative expression by any member of Congress of an intention that it should be applied to services rendered prior to its enactment.

Id. at 178 (Pet. A. 79a-80a). Furthermore, the only other court which has considered this precise question has agreed that "[t]he inconclusive legislative history of Section 718 furnishes no basis for inferring that Congress intended this provision to be given [retroactive] effect." *Johnson, supra* at 87.¹²

Since the School Board is in agreement with the view of the Fifth Circuit regarding the "inconclusive" nature of the legislative history of Section 718 which at best is tortuous and complex, relevant portions of this history have been set forth in the attached Appendix (1a-16a). Suffice it to say that the one conclusion that can most definitely be drawn is that the legislative history fails to establish any indication, much less a clear manifestation, that any member of Congress intended that Section 718 should be applied retroactively to legal services rendered prior to its effective date; hence, the presumption of prospective application is entirely dispositive of the Petitioners' contentions to the contrary.¹³

¹² It should be emphasized that both a re-hearing and a re-hearing *en banc* have been denied by the Fifth Circuit. *Johnson v. Combs*, 472 F.2d 1405 (5th Cir. 1973). It is further significant that in an opinion dated June 22, 1973, the Fifth Circuit adhered to its earlier opinion in *Johnson* in holding that "Section 718 is not to be applied retroactively 'to the expenses incurred during the years of litigation prior to its enactment'. . . ." *Henry v. Clarksdale Mun. Sep. School Dist.*, 480 F.2d 583, 585 (5th Cir. 1973).

¹³ A recent decision concerning the applicability of another section of the Education Amendments Act of 1972 is likewise instructive in

Nevertheless, the Petitioners seize upon the deletion of the phrase "for services rendered, and costs incurred, after the date of the enactment of this Act" which at one time was found in the "Quality Integrated Education Act" as introduced by Senator Mondale in September of 1971 (5a) and urge that "[t]his Court should not read back into section 718 the very limitation regarding application to services performed prior to enactment which was deliberately removed from the statute by Congress" (P. Br. 17). The most reasonable and indeed only logical explanation

determining the manner in which Section 718 is to be applied in this case. Section 803 of the Act expressly directs that the effectiveness of orders directing the transportation of school children for the purpose of racial balance be postponed until all appeals have been exhausted. Pub. L. 92-318, 86 Stat. 372; 20 U.S.C.A. § 1653 (Cum. Supp. 1973). In *Soria v. Oxnard School District Board of Trustees*, 467 F.2d 59 (9th Cir.) (Per Curiam), *application for stay denied*, U.S., 93 S.Ct. 282 (1972), however, the United States Court of Appeals for the Ninth Circuit in denying a stay of an earlier order requiring the transportation of students under a plan of desegregation which had been previously implemented, specifically construed Section 803 as having "no application to a case pending at the time of its effective date in which transportation of students pursuant to integration plan, is already in operation" *Id.* at 60. The Court based its decision on "the general principle that a statute is presumed to apply only prospectively except where Congress has clearly and unambiguously indicated that the statute is retroactive." *Id.*, citing *inter alia*, *Union Pacific R. Co. v. Laramie Stock Yards Co.*, *supra* and *Greene v. United States*, *supra*. Although, unlike the instant case, a far stronger indication of an intention of retroactive application was manifested by at least some members of Congress, the Court nevertheless recognized that the requisite clear intent was lacking and thus concluded that the "sense conveyed is that of a continuation of the status quo, not a disruption of it." *Soria*, *supra* at 60-61.

Such an interpretation of a specific provision of the same general legislation which includes Section 718 lends further support to the conclusion that Congress intended that all of the provisions of the Education Amendments Act of 1972 were to apply prospectively only, *i.e.*, with respect to previously implemented transportation orders and completed pre-July, 1972 legal services, a "preservation of the status quo ... not a disruption of it. . . ." *Id.*

as to the deletion of the parenthetical phrase referring to legal services after July 1, 1972, is that this phrase was an integral part of other language providing for federal funding of the fees (5a-8a). No appropriations for funding were anticipated until the fiscal year commencing July 1, 1972, hence the necessity for language limiting the payment for services rendered subsequent to that date. When the concept of federal funding as originally envisioned by Senator Mondale was eliminated in the legislative process (9a), all language applicable to federal funding *as well as that designed to effectuate* it was deleted.

Clearly, the Court of Appeals in the companion case was correct in concluding that no clear intention of retrospective application could be gleaned "from the omission of a provision in an earlier draft expressly limiting its application to services rendered after its enactment, when the earlier draft was extensively revised and there is no affirmative expression by any member of Congress of an intention that it should be applied to services rendered prior to its enactment." *Thompson, supra* at 178 (Pet. A. 79a-80a).

The short answer which in the view of the School Board refutes any and all contentions that Congress intended Section 718 to apply to services rendered prior to July 1, 1972, is that there is no indication whatsoever that even a single member of Congress expressed any opinion that retroactive application might be desirable. Since, as this Court has often recognized, legislators are presumed to be aware of the existing state of the law,¹⁴ the Congressmen here, well-experienced in delineating the circumstances under which attorneys' fees were allowable in civil rights ac-

¹⁴ *E.g.*, *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 187 (1959), *rehearing denied*, 361 U.S. 945 (1960); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106-07 (1941).

tions, and presumably cognizant that the conduct-oriented standard enjoyed uniform application, were obviously aware of the normal rule of prospective application; hence, if retrospective operation was their intention, the members of Congress likewise must be presumed to have known that unequivocal pronouncements to that effect would have been required.

As an additional ground for their contention that Section 718 should be applied "in all cases in which the question of attorneys' fees has not been finally resolved before July 1, 1972" (P. Br. 21),¹⁵ the Petitioners rely on *Thorpe*, *supra* and its progenitor, *Schooner Peggy*, *supra*, which deal with the effect of changes in the law during the process of appeal. Though Petitioners do not expressly embrace Judge Winter's view that "[s]ince *Thorpe* governs, legislative history is not relevant, unless it unequivocally shows an intention on the part of Congress that the statute *not* apply to live issues in currently pending cases . . . [and] [t]he legislative history of Section 718 provides no such expression of intent. . . ." (472 F.2d 336; 196a) (dissenting opinion), they do contend that "this Court has routinely applied new laws to all cases pending on appeal, without reference to legislative history and without requiring express statutory language that they be so applied" (P. Br. 13). This charac-

¹⁵ The Petitioners do not delineate the scope or sweep of this position, but if it is sustained, it apparently could be invoked in all school desegregation cases remaining on court dockets throughout the country where no formal action has ever been taken on that portion of the prayer of the bill of complaint requesting attorneys' fees. It is not clear as to whether this interpretation of Section 718 also would provide a basis for reopening the question of attorneys' fees in other school desegregation cases wherein the traditional conduct-oriented standard was applied, and if not, Petitioners have presented no rational basis for subjecting school boards to different standards during the same period of time.

terization of the teachings of *Schooner Peggy* and *Thorpe* is erroneous as this Court did indeed refer to legislative intent, and its inquiry as to legislative intent was decisive in both cases; furthermore, the consideration of legislative intent made is perfectly consistent with the classic rule of statutory construction. Even had this not been the case, it is inconceivable that this Court would have abrogated or substantially modified such a well established tenet of statutory construction by mere implication.

In *Schooner Peggy* and *Thorpe*, changes in law and an administrative regulation, respectively, while appeals were pending were applied by this Court to the factual situation before it, but only after a determination that the changes were intended to apply to the events under review.

In *Schooner Peggy*, Mr. Chief Justice Marshall applied a treaty between the United States and France which was entered into while the case was on appeal—but only after a detailed examination of a legislative intention which convinced him that the intervening law "... *positively change[d] the rule which governs.*" *Schooner Peggy*, *supra* at 110 (emphasis added). Thus, the proper interpretation of *Schooner Peggy* is that an appellate court is bound to apply a change in existing law *only if* it clearly appears to be applicable to the operative facts which transpired prior to its enactment.¹⁸ Though rejecting this interpretation, Judge

¹⁸ There are a significant number of decisions wherein courts have construed various federal statutes authorizing awards of attorneys' fees in a manner entirely consistent with this interpretation.

The question of the retroactivity of an award of attorneys' fees arose following the enactment of the Criminal Justice Act of 1964, 18 U.S.C. §3006A (1964), a portion of which specifically authorized such awards for attorneys representing indigents charged with certain criminal offenses. 18 U.S.C. §3006(A) (d). Several courts had occasion to consider whether the Act applied to appointments made and services rendered prior to its effective date. Generally, the courts split on the

Winter in his dissent below acknowledged that both the facts in *Schooner Peggy* and much of the language of Mr. Chief Justice Marshall supported this analysis:

Peggy may be interpreted in two ways: Under a narrow interpretation the Court held only that, where the law changes between the decision of the lower court and an appeal, *the appellate court must apply the new law if, by its terms, it purports to be applicable to pending cases. The decisional process, under this interpretation, requires the appellate court to examine the intervening law and to determine whether it was intended to apply to factual situations which transpired*

question of whether *appointment* as counsel prior to the effective date of the Act precluded an award thereunder. There has been unanimity, however, in the rejection of contentions that the Act applied to *services rendered* prior to its effective date of August 20, 1965.

With respect to the date of appointment of counsel, the decision in *United States v. Pope*, 251 F.Supp. 234 (D. Neb. 1966) represents the minority view that the Act did allow for the award of fees to counsel *appointed* prior to its effective date. Even so, that Court *still restricted the award in question to services rendered and expenses incurred after the effective date of the Act.*

The majority of the courts that have considered the question, however, regard the date of appointment of counsel as the determining factor for the award of fees under the Criminal Justice Act of 1964. In *United States v. Thompson*, 356 F.2d 216 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966), the Court even though commending counsel who had been appointed some two months prior to the effective date of the Act, explained its actions in refusing to approve his eligibility for an award under the Criminal Justice Act in the following terms:

The bulk of his work including preparation of the brief and arguing the appeal was done subsequent to August 20, 1965, the effective date of the plans of this Court and the District Court under the Criminal Justice Act. . . . The sole reason for our denying his motion is that although the services for which he wishes to be compensated were rendered subsequent to August 20, 1965, his appointment was prior thereto.

United States v. Thompson, *supra* at 227 n. 12. Other Courts of Appeals have made similar findings. *E.g.*, *United States v. Dutsch*, 357

prior to the law's enactment. Since the treaty in *Peggy* explicitly applied to situations where the controversy was still pending, it followed that the statute should be applied in deciding the case. *Certainly the facts of Peggy and much of the language of the opinion of Mr. Justice Marshall support this interpretation.*

(472 F.2d 334; 192a) (emphasis added).

Similarly, in *Thorpe* this Court first construed the intent of the change in the administrative regulation before applying it to the case at hand. In *Thorpe* the Housing Authority had refused to give any reasons for the notice to

F.2d 331 (4th Cir. 1966); *Dolan v. United States*, 351 F.2d 671 (5th Cir. 1965) (Per Curiam).

In *Dutsch*, Judge Sobeloff held that a prior appointment foreclosed compensation for services as subsequently authorized under the Act. *Dutsch*, *supra* at 333. Significantly, in *Dutsch*, just as in the instant case, the enactment of the legislation occurred subsequent to the lower court's decision but prior to final disposition of the matter on appeal. The fact that awards under the Criminal Justice Act are federally funded and thus tied to specific appropriations merely sheds light on the *decisive inquiry* concerning whether the Act was intended to apply to a factual situation occurring prior to its enactment.

The other area in which courts have considered questions relating to the retroactivity of statutory awards of attorneys' fees involves an amendment to the Social Security Act, 42 U.S.C. § 406(b) (1955). In *Fenix v. Finch*, 436 F.2d 831 (8th Cir. 1971), a question arose involving the amendment to the Social Security Act which had become effective as of July 30, 1965, and which limited the amount of attorneys' fees recoverable by a successful litigant to a certain defined percentage of the benefits recovered. In that case HEW contended that the amount of the award in question was controlled by the newly enacted provision. The Court, however, held that "under the circumstances of this case, the Act is not controlling, since it is not retroactive. . . ." *Id.* at 832. The Court of Appeals below reached a similar conclusion in *Robinson v. Gardner*, 374 F.2d 949 (4th Cir. 1967).

The foregoing rationale utilized in considering questions related to the retroactivity of statutory awards of attorneys' fees clearly explodes the myth that an appellate court must apply changes in the law to pending cases, and further indicates that Section 718 is inapplicable to legal services rendered prior to its enactment.

vacate and the tenant sought judicial relief. Actual eviction, however, was stayed pending appeal. Subsequent to the institution of the action and the decision on the part of the lower court and after this Court had initially granted certiorari to consider whether the tenant was denied due process of law by the Housing Authority's summary actions, the Department of Housing and Urban Development issued a new regulation requiring that reasons be specified in any notice of termination.

This Court thus vacated the lower court's judgment and remanded the case for a decision in light of the new regulation "[s]ince the application of this directive to [the tenant] would render a decision on the constitutional issues . . . raised unnecessary . . ." *Thorpe, supra* at 273. When the case returned to this Court pursuant to the lower court's refusal to apply the new directive, it is significant that before applying the new regulation, this Court first concluded that it was applicable to all tenants "*still residing in such [housing] projects on the date of this decision.*" *Id.* at 274 (emphasis added).

It should also be pointed out that such a reasonable interpretation of the new regulation enabled this Court to judiciously avoid a substantial question of due process which otherwise would have been presented had the regulation been construed as inapplicable to the case before it. The Petitioners' interpretation of *Thorpe* would be far more accurate if the Court had applied the regulation to a tenant whose actual eviction had been a fait accompli prior to the decision of this Court.

To say that no question of retroactivity is involved in this case or in the application of a change in law to a pending case is to engage in an exercise in semantics. Section 718 addresses itself to legal services. The Act became effective

July 1, 1972, and the legal services involved in this suit were rendered prior to July 1, 1972. To phrase it somewhat differently, the operative acts or events giving rise to liability under Section 718 are *legal services*, the last of which were rendered in this case more than 17 months prior to the effective date of Section 718. It requires tortuous reasoning to conclude that no question of retroactivity is involved.

Thus, consideration which this Court gave to retroactive intent in both *Schooner Peggy* and *Thorpe* belies the contention that these authorities either render legislative intent irrelevant or reverse the presumption against retroactivity. Legislative intent remains the threshold and decisive inquiry and there is nothing in the history of Section 718 to support a finding that Congress intended the standard embodied therein to be applied to legal services rendered prior to July 1, 1972. This conclusion finds support in the decisions of the United States Court of Appeals for the Fifth Circuit in *Johnson, supra*, and in *Henry, supra*, in both of which the Fifth Circuit relied solely on the "inconclusive legislative history of Section 718" in refusing to apply that provision to legal services rendered prior to its effective date.

II.

THE DEVELOPMENT OF ANY ADDITIONAL STANDARD GOVERNING AWARDS OF ATTORNEYS' FEES IN SCHOOL DESEGREGATION ACTIONS IS NEITHER NECESSARY NOR APPROPRIATE.

Assuming that Section 718 of the Emergency School Aid Act of 1972 does not attach to legal services performed prior to its effective date, there remains a question as to whether the traditional standard based on a school board's

obstinate conduct should be replaced with a less restrictive one.¹⁷

Significantly, this Court, in its per curiam opinion in *Northcross*, indicated that it had specifically left open "whether, and under what circumstances, an award of attorneys' fees is permissible in suits brought under 42 U.S.C. §1983 in the absence of specific statutory authorization for such an award." *Northcross, supra* at 2202 n.2. Even though the question as stated by this Court could reach varied types of civil rights cases, on the record here the Court's inquiry should be limited to school desegregation actions alone. Moreover, since courts have consistently applied the traditional equitable standard to legal services rendered in school desegregation cases prior to July 1, 1972, even in the absence of a specific statutory authorization, the inquiry properly may be further narrowed to a consideration as to whether the unique nature of this type of litigation as well as the absence of definitive guidelines prior to *Swann* justify the retention of the conduct-oriented standard for pre-*Swann* legal services as being more restrictive than might otherwise be appropriate in *other* suits brought under Section 1983.

With the scope of the inquiry thus defined, it is clear that all courts which have considered the specific question have agreed that an award of attorneys' fees is permissible in school desegregation suits brought under 42 U.S.C. §1983

¹⁷ For example, the new standard governing awards under Section 718 as announced in *Northcross v. Board of Education of Memphis, U.S. . . .*, 93 S. Ct. 2201, 2202 (1973) (Per Curiam). In *Northcross*, this Court relying heavily upon the Fifth Circuit's decision in *Johnson v. Combs*, 471 F.2d 84, 86 (5th Cir. 1972) concluded that in cases where Section 718 authorized the payment of attorneys' fees to successful plaintiffs, the district court's discretion in each case was limited to the extent that the successful plaintiff "should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Northcross, supra* at 2202.

even though there has been no specific statute authorizing such awards. Indeed, all courts which have considered the question have agreed on the *circumstances* under which such awards are permissible, the only point of departure being the *alternative ground* relied upon by the District Court below (53 F.R.D. 30, 41-42; 114a, 137a-140a). The specific circumstances have been embodied in the "traditional equitable standard", which, at the outset of its opinion, the Court of Appeals described in the following terms:

... only in "the extraordinary case" where it has been "found that the bringing of the action should have been unnecessary and was compelled by the School Board's unreasonable, obdurate obstinacy or persistent defiance of law", would a Court, in the exercise of its equitable powers, award attorney's fees in school desegregation cases.

(472 F.2d 320; 161a) (citation omitted). The foregoing standard has been consistently and uniformly applied in defining the scope of a district court's discretion to award attorneys' fees in school desegregation cases for nearly a decade, not only the Court of Appeals below,¹⁸ but also by Courts of Appeals for the Fifth,¹⁹ Sixth,²⁰ Eighth²¹ and

¹⁸ *E.g.*, *Bradley v. School Bd. of City of Richmond*, 472 F.2d 318, 320 (4th Cir. 1972); *Brewer v. School Bd. of City of Norfolk*, 456 F.2d 943, 949-51 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972); *Walker v. County School Bd. of Brunswick*, 413 F.2d 53, 54 (4th Cir. 1969), *cert. denied*, 396 U.S. (1970); *Felder v. Harnett County Bd. of Educ.*, 409 F.2d 1070, 1075 (4th Cir. 1969); *Bradley v. School Bd. of City of Richmond*, 345 F.2d 310, 321 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965); *Bell v. School Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963).

¹⁹ *E.g.*, *Henry v. Clarksdale Mun. Sep. School Dist.*, 480 F.2d 583, 585-86 (5th Cir. 1973) (Per Curiam); *Johnson v. Combs*, 471 F.2d 84, 85, 87 (5th Cir. 1972), *rehearing and rehearing en banc denied*,

Ninth²² Circuits, the only Appeals Courts which, to date, have had occasion to consider this precise question.

It is submitted that this consistent and uniform adherence to the traditional standard on the part of the various Courts of Appeals is in itself sufficient reason why it should be affirmed here as defining the authority and circumstances under which a district court may award counsel for successful plaintiffs in school desegregation cases fees for services rendered prior to the effective date of Section 718. In addition, three factors militate strongly against the adoption of any new judicially invoked standard to define

472 F.2d 1405 (5th Cir. 1973); *Horton v. Lawrence County Bd. of Educ.*, 449 F.2d 1405 (5th Cir. 1971); *Williams v. Kimbrough*, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

²⁰ *E.g.*, *Monroe v. Board of Comm'rs. of City of Jackson*, 453 F.2d 259, 262 (6th Cir.), *cert. denied*, 406 U.S. 945 (1972); *Rolfe v. County Bd. of Educ.*, 391 F.2d 77, 81 (6th Cir. 1968).

²¹ *Walton v. Nashville, Ark. Special School Dist. No. 1*, 401 F.2d 137, 145 (8th Cir. 1968); *Jackson v. Marvell School Dist. No. 22*, 389 F.2d 740, 747 (8th Cir. 1968); *Clark v. Board of Educ. of Little Rock School Dist.*, 369 F.2d 661, 670-71 (8th Cir. 1966); *Kemp v. Beasley*, 352 F.2d 14, 23 (8th Cir. 1965); *Rogers v. Paul*, 345 F.2d 117, 125-26 (8th Cir.), *vacated and remanded on other grounds*, 382 U.S. 198 (1965). In *Clark v. Board of Education of Little Rock School District*, 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972), the Eighth Circuit awarded attorneys' fees for services performed in connection with the appeal only. *Id.* at 499. Nevertheless, in view of its earlier findings in the same case of "obstinate, adamant, and open resistance to the law" *Id.* 369 F.2d at 671, the reasonable implication is that the Eighth Circuit fully adhered to the traditional standard in approving an award for appellate services. The fact that the same Court denied attorneys' fees in a school desegregation case decided the same day as *Clark*, *Davis v. Board of Education of North Little Rock School District*, 449 F.2d 500, 502 (8th Cir. 1971) (*Per Curiam*), effectively negates any suggestion that the Eighth Circuit has departed from the traditional standard.

²² *Kelly v. Guinn*, 456 F.2d 100, 111 (9th Cir. 1972).

the scope of a district court's authority to award attorneys' fees in the absence of a specific statutory authorization, *i.e.*, the fairness inherent in applying the conduct-oriented standard to services rendered prior to *Swann*, the existence of the specific statutory authorization for all legal services rendered on or after July 1, 1972, and the unquestioned invitation to increased and burdensome litigation which would be produced by the adoption of any new standard governing legal services performed prior to July 1, 1972.

Were it not for the presence of the specific Congressional mandate for awards of attorneys' fees to successful plaintiffs in school desegregation actions, compelling arguments could be made in support of a less restrictive judicial standard governing awards for services performed subsequent to the rendition of this Court's opinion in *Swann*, which in the late spring of 1971 finally delineated the fundamental methods for accomplishing a unitary system of schools in an urbanized area.²³

Prior to this Court's decision in *Swann*, school authorities and the lower federal courts as well were forced to speculate as to the tools of desegregation that might be required or permissible in devising a unitary plan of operation for city school systems.²⁴ Even though *Green v. County School*

²³ See also, *Davis v. Board of School Comm'rs.*, 402 U.S. 33 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

²⁴ Undoubtedly, this Court was appreciative of the fact that substantial uncertainties concerning the precise means by which urban school systems were to be desegregated were prevalent prior to its decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), noting therein that "[t]hese cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing . . . unitary systems at once." *Id.* at 6. It also recognized that "in an area of evolving remedies" requiring improvisation and experi-

Board of New Kent County, 391 U.S. 430 (1968), decided approximately three years earlier, was explicit in terms of the duty on the part of school authorities to eliminate segregation which remained in a two-school rural system under a freedom of choice plan which obviously had not worked, it offered little in the way of guidelines for a large urban school system beset with complex patterns of segregated housing. Since the guidelines which had been lacking were detailed in *Swann*, however, a less restrictive standard governing awards of attorneys' fees to successful plaintiffs might well be warranted for legal services performed after April 20, 1971.

It is thus submitted that the acknowledged pre-*Swann* uncertainties in the legal requirements surrounding the means by which an urban school board was to implement a unitary system of schools dispels any basis for the shifting of fees to such defendants, and the retention of the conduct-

mentation "without detailed or specific guidelines," other federal courts had been forced "to grapple with the flinty, intractable realities of day-to-day implementation of . . . constitutional commands. Their efforts, of necessity, embraced a process of 'trial and error,' and our effort to formulate guidelines must take into account their experience." *Id.* This Court further stated that "[t]he problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts." *Id.* at 14 (footnote omitted). See also, *Northcross v. Board of Education of Memphis*, 397 U.S. 232, 237 (1970) where Mr. Chief Justice Burger earlier had acknowledged that a number of fundamental questions remained unresolved.

Further illustrative of the substantial degree of uncertainty antedating *Swann* was the near universal action on the part of the lower courts in deferring pending school desegregation actions pending this Court's resolution of the issues presented by *Swann* (53 F.R.D. 33; 120a). Similarly, many cases pending on appeal were remanded to district courts for re-evaluation in light of the *Swann* decision. See, e.g., *Adams v. School Dist. No. 5, Orangeburg County*, 444 F.2d, 101 (4th Cir. 1971) (Per Curiam).

oriented standard governing legal services rendered during that time would be both reasonable and fair in that the pursuit of good faith defenses in an "area of evolving remedies" presents no cause for the administration of any retroactive penalty. The same reasoning likewise precludes the applicability of the rationale under which the less restrictive standard has been applied in other civil rights cases involving *clear violations of known rights*²⁵ or in cases where others who have received an obvious benefit from the plaintiffs' successful efforts in nullifying plainly illegal or reprehensible conduct will be unjustly enriched thereby unless, by virtue of its jurisdiction, the court can shift the fees in such a manner as to spread the costs proportionately among the class benefitted.²⁶

With the Congressional enactment of Section 718, however, a more lenient standard as determined by this Court in *Northcross, supra*, now provides for the most uniform treatment imaginable where school authorities continue to insist upon litigation in lieu of affording plaintiffs rights which are plainly due. No longer does the pre-*Swann* uncertainty surrounding guidelines for urban desegregation

²⁵ *E.g.*, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (3d Cir. 1971). It is significant that the United States Court of Appeals for the Fifth Circuit has recently declared that "attorneys' fees may be awarded in § 1983 civil rights suits . . . [only] 'where the actions of the defendants were unreasonable and obdurately obstinate.'" *Rainey v. Jackson State College*, 481 F.2d 347, 350 (5th Cir. 1973), *citing inter alia*, *Jinks v. Mays*, 464 F.2d 1223, 1228 (5th Cir. 1972) (emphasis added). *Rainey* is further instructive in that the Court specifically indicated the type of conduct on the part of the defendants that sustained an award, *i.e.*, an outright violation of an earlier order of the Fifth Circuit. *Rainey, supra* at 351.

²⁶ *E.g.*, *Hall v. Cole*, _____ U.S. _____, 93 S.Ct. 1943 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

justify further delay in the establishment of unitary systems, and it is now fair, reasonable and appropriate for school authorities to be charged with the legal fees of successful plaintiffs.

Thus, owing to the existence of the present Congressional mandate shifting the burden of payment of legal fees to defendant school authorities, the wisdom of further judicial intervention in this area in which the legislative branch has conclusively spoken must be questioned. It can be reasonably assumed that the Congressional inaction prior to the enactment of Section 718 was deliberate and with full knowledge of the traditional equitable standard which at that time enjoyed uniform application in all the Circuits.²⁷ Conversely, it would be unreasonable to assume that Congress, though enacting specific provisions calling for the payment of legal fees in other areas of civil rights litigation,²⁸ had simply overlooked the entire area of school desegregation. As the Court of Appeals noted, "[c]ourts should not assume that Congress legislates in ignorance of existing law, whether statutory or precedential" (472 F.2d 330; 184a). Thus, since Congress has now created an affirmative statutory authorization, the formulation at this time of any new judicially invoked standard regarding the basis for awards of attorneys' fees prior to July 1, 1972, would be inappropriate and inconsistent with the exercise of sound judicial discretion.

A significant additional factor also militates strongly against this Court's displacing the traditional equitable stan-

²⁷ See text and cases cited at note 14 *supra*.

²⁸ In the Civil Rights Act of 1964, for instance, Congress expressly provided for awards of attorneys' fees to successful plaintiffs in actions under the Public Accommodations and Equal Employment Opportunity sections. 42 U.S.C. §§2000a-3(b), 2000e-5(k) (1964).

dard which governs awards for services rendered prior to July 1, 1972. The degree of additional litigation which the adoption of any new standard would invite and foster can be best understood when viewed in terms of the relief which the Petitioners are here requesting. Even though made in the context of an award under Section 718, the Petitioners' statement to the effect that this Court should authorize awards "in all cases in which the question of attorneys' fees has not been finally resolved before July 1, 1972" (P. Br. 21), is indicative of the possible scope of any new standard which this Court might adopt.

As a matter of historical practice, the Petitioners have requested awards of attorneys' fees in most desegregation cases. Obviously, as the Fifth Circuit recognized, "most school cases involve relief of an injunctive nature which must prove its efficacy over a period of time . . ." *Johnson, supra* at 87. Necessarily, most of these cases remain on the dockets of the various district courts during which time "it is obvious that many significant and appealable decrees will occur in the course of litigation which should not qualify as final in the sense of determining the issues in controversy. . . ." *Id.* Thus, as the Petitioners suggest, all such cases "in which the question of attorneys' fees had not been finally resolved prior to July 1, 1972," would be amenable to either (1) further litigation based on the traditional equitable standard, which it is submitted would be entirely appropriate, or (2) further litigation involving any new standard which this Court might elect to apply.

Clearly, this latter circumstance places an onerous burden on school authorities who, for periods of time prior to July 1, 1972, pursued good faith defenses of school desegregation cases. The nature of this burden is most aptly described by the Fifth Circuit, certainly the one Court of

Appeals which has had the heaviest docket in the area of school desegregation actions:

... School desegregation litigation has produced precedents which have been somewhat less than clear and explicit. Even when plaintiff and defendant were in agreement about the end to be reached, the means and the timing which would accomplish the goal often remained in bitter dispute. There was a necessity that the demand for the aggrieved plaintiffs be harmonized with legitimate educational interests of the school authority and the community as a whole in the smooth and uneventful transition to a unitary school system. Many school districts have been litigating in this field filled with fast-changing precedents and guidelines for a number of years; to apply [Section 718, *i.e.*, a new standard] retroactively would place a wholly unexpected and unwarranted burden on these districts who have done no more than litigate what they, in good faith, believed to be demands which exceeded the Constitution's demand.

Under these circumstances, a retroactive application of [Section 718, *i.e.*, a new standard] would punish school boards for good faith action in seeking the guidance of the courts to determine what was required of them. Furthermore, retroactive awards of attorneys' fees for these past years of litigation would not serve the purpose of encouraging future legal challenges of segregated school systems. . . .

Johnson, supra at 86-87 (footnote omitted).

Not only would the application of any new standard at this time be onerous, but any such new standard must necessarily be defined with regard to precise events or dates beyond which it would be applicable. In this context, any limitations which failed to extend the scope of the award

back to the time of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) would be arbitrary and productive of the incongruous result that many of the school authorities who, with the massive resources of state treasuries at their disposal, openly defied this Court's earlier mandates against segregated education would escape the reach of any charge for the payment of fees incurred in the torturous litigation which those seeking admission to schools on an equal basis were forced to undergo.

With the current application of the traditional equitable standard regarding awards of attorneys' fees for services performed prior to July 1, 1972, and the uniform statutory standard embodied in Section 718 governing all services rendered thereafter, no rational basis exists for incurring the predictable ramifications outlined above through any disturbance of the status quo.

III.

**THE COURT OF APPEALS PROPERLY REVERSED THE
DISTRICT COURT'S AWARD SINCE THE RECORD
FAILS TO SUPPORT THE REQUISITE FINDINGS OF A
PATTERN OF OBDURATE OBSTINACY ON THE PART
OF THE SCHOOL BOARD.**

In making the award in question, the District Court went to great lengths to describe a pattern of bad faith conduct on the part of the School Board which, in its view, required that fees be awarded (53 F.R.D. 30-33, 39-41; 113a-121a, 133a-137a). Through a close and exhaustive examination of the circumstances relied upon by the District Court (472 F.2d 320-27; 162a-177a), however, the Court of Appeals was compelled to conclude that "these criticisms of the conduct of the Board, upon which, to such a large extent, the Court's award rests, represent exercises in hindsight rather

than appraisal of the Board's action in the light of the law as it then appeared"²⁹ (472 F.2d 320-21; 163a). Though the District Court itself recognized that the Board's conduct must be considered with reference to the state of the law in 1970 (53 F.R.D. 39; 133a), and also had recognized during the 1970 hearings that the major issue dividing the parties at that time was shrouded with genuine uncertainty, it nevertheless predicated its post-*Swann* opinion awarding fees on the conclusion that "the relevant legal standards were clear" (53 F.R.D. 39; 134a).

A.

Significant Contemporaneous Findings on the Part of the District Court Are Totally Inconsistent with Its Subsequent Conclusions Regarding the School Board's Conduct.

Both the record herein and the District Court's previous opinions are replete with illustrations that its May 26, 1971 findings are irreconcilable with its earlier findings and comments which had been made contemporaneously with the occurrence of the events in question. While the exhaustive treatment on this issue on the part of the Court of Appeals (472 F.2d 320-27; 162a-177a) is entirely adequate and fully supports its conclusion that the record failed to sustain the District Court's findings, a few examples bear repetition here.

One of the primary grounds upon which the lower Court relied was its view that since "the relevant legal standards

²⁹ In finding that the District Court had erred in this regard, the Court of Appeals relied on *Monroe v. Board of Commissioners*, 453 F.2d 259 (6th Cir. 1972) wherein the Sixth Circuit stated in effect that in determining whether a school authority's conduct had been unduly obstinate, "we must consider the state of the law as it then existed." *Id.* at 263.

were clear, it is not unfair to say that the litigation was unnecessary" (53 F.R.D. 39; 134a). Yet many of the District Court's statements and actions during the period of time in question clearly refute the accuracy of its May 26, 1971 conclusion.

As early as the August, 1970 hearings during which the School Board presented an interim plan for the 1970-71 school year, the District Court though not satisfied that the plan was entirely proper owing to the remaining racial identifiability of a number of non-contiguous elementary facilities, nevertheless recognized that it would have been "unreasonable" to have required the Board to purchase the additional buses needed to assure the complete desegregation of *all* of its elementary schools:

... it seems to me it would be completely unreasonable to force a school system that has no transportation, and you all don't have any to any great extent, to go out and buy new buses when the United States Supreme Court may say that is wrong.

(Hearings of Aug. 7, 1970, Tr. 295; 85a).

Later, in its August 17, 1970 opinion authorizing the implementation of the School Board's interim plan, the District Court, again in the context of the Board's duty to purchase additional transportation facilities, recognized that "the solution is not free from difficulty", and specifically noted Mr. Chief Justice Burger's earlier comment to the effect that practical problems remained for determination, not the least of which concerned the extent to which transportation might be required in the achievement of a unitary system. *Bradley v. School Board of City of Richmond*, 317 F.Supp. 555, 575 (E.D. Va. 1970), citing *Northcross v. Board of Education of Memphis*, 397 U.S. 232 (1970). The lower

Court concluded that it was "led to the sincere belief that by approving [the Board's] plan the Court [was], as required in this Circuit, adopting the test of reasonableness under the circumstances existing." *Bradley, supra* at 575.

The foregoing conclusions, however, are in stark contrast with the District Court's post *Swann*, May 26, 1971 findings concerning a "policy of inaction" on the part of the School Board which had made "effective and immediate further relief nearly impossible because it had not taken the specific step of seeking to acquire buses" (53 F.R.D. 33; 120a).

While the record herein contains numerous similar contemporaneous statements by the District Court revealing its appreciation of the existence of many legal uncertainties and the fact that everyone was anticipating this Court's decision in *Swann*,³⁰ the frustration which persisted at that time is perhaps best illustrated by the District Judge's own comments rendered in an opinion approving a School Board plan for the 1971-72 year:

The law establishing what is and what is not a unitary school system lacks the precision which men like to think imbues other fields of law; . . . [n]ot only do the means required to integrate vary from one area to the next, but also the end in sight . . . varies. . . . [U]ni-tary nature . . . is a characteristic which a system may possess in varying degrees.

Bradley, supra 325 F.Supp. 828, 844 (E.D. Va. 1971).

Finally, even in its May 26, 1971 opinion awarding fees, the District Court conceded that it had declined to order any mid-year relief in Richmond³¹ in recognition that at

³⁰ *E.g.*, *Bradley v. School Bd. of City of Richmond*, 325 F.Supp. 828, 832 (E.D. Va. 1971); 324 F.Supp. 456, 459 (E.D. Va. 1971); Hearings of March 4, 1971, Tr. 42; 101a.

³¹ *Bradley v. School Bd. of City of Richmond*, 324 F.Supp. 456 (E.D. Va. 1971).

that time all appellate courts were awaiting some definitive rulings from this Court concerning the extent of the duty on the part of school authorities to desegregate urban school systems and owing to this lack of guidelines, the lower Court confessed that it "felt that it would not be reasonable to require further steps to desegregate [in Richmond] during the second semester" (53 F.R.D. 33; 120a). The only "further step" in dispute involved the purchase of buses to provide for the cross-town transportation of elementary pupils (53 F.R.D. 32-33; 118a-120a).

Clearly, the foregoing comments of the District Court rendered in the context of the law during 1970-71 as it was then understood, provide ample justification for the Court of Appeals' conclusion that the lower Court's May 26, 1971 award, based as it was on such findings as the School Board's "reluctance to accept clear legal direction" (53 F.R.D. 40; 135a), was representative of an exercise in "hindsight" (472 F.2d 320; 163a).

Since it is quite obvious that in awarding Petitioners' attorneys' fees the District Court relied substantially on its findings of a *pattern of bad faith conduct* on the part of the School Board (53 F.R.D. 30-33, 39-41; 113a-121a, 133a-137a), examples of its contemporaneous statements indicating a contrary impression should likewise be reviewed.

During the August, 1970 hearings on the School Board's interim plan, the District Court delivered the following commendation regarding both the Board's concession that its freedom of choice plan had not worked and its decision to devise a new plan in lieu of litigating the merits of the old one: "[i]t was a nice, honest thing to come in and say, 'Let's not waste any more time on it. It simply has not worked, and let's get to it'" (Hearings of August 7, 1970,

Tr. 33; 80a). Later in the course of the same proceedings, while the District Judge indicated his dissatisfaction with that portion of the Board's interim plan which left some elementary facilities on opposite sides of the city substantially of one race, he nevertheless indicated that he was "satisfied Dr. Little and Mr. Adams [Richmond's chief school administrators] [had] been working day and night diligently to do the best they could, the [S]chool Board too" (Hearings of August 7, 1970, Tr. 294; 85a).

Finally, in its subsequent opinion approving the Board's plan for 1970-71, the District Court noted that

[i]t is apparent that in the draft of this proposed plan the board made effort, utilizing the facilities available, to conform to its interpretation of the laws enunciated by the United States Court of Appeals for the Fourth Circuit.

Bradley, supra 317 F.Supp. 555, 573 (E.D. Va. 1970).

While examples of similar commendatory statements exist elsewhere in the record,³² suffice it to say that when the lower Court's contemporaneous findings are compared with those contained in its May 26, 1971 opinion awarding attorneys' fees, the inconsistencies and self-contradictions which are plainly apparent serve to further sustain the Court of Appeals' holding that the District Court had erred in finding a pattern of "obdurate obstinacy" on the part of the School Board (472 F.2d 320; 162a).

In the view of the Board, the critical uncertainties which existed during 1970 and early 1971 centered around the extent to which transportation might be required in achieving a unitary system, as well as the extent to which non-

³² *E.g.*, *Bradley v. School Bd. of City of Richmond*, 325 F.Supp. at 832; 324 F.Supp. at 469.

contiguous elementary facilities might have to be paired in achieving this status. These were the areas in which the School Board's 1970-71 desegregation plan was, when viewed retrospectively in terms of this Court's decision in *Swann*, somewhat deficient. The significant point, however, is that the District Court at the time also fully understood the various uncertainties surrounding these particular legal requirements as illustrated by the foregoing examples. Finally, it should be noted that the School Board devised and submitted a plan to the District Court which, although tendered well in advance of this Court's decision in *Swann*, nevertheless was fully compatible with the guidelines later expressed therein³³ (88a-89a, 97a).

The principle that the findings of the trial court are entitled to great weight is obviously inapplicable where such findings are totally inconsistent with statements and conclusions made by the same court contemporaneously with the occurrence of the events under review. In concluding that the record failed to support a pattern of evasion, obstruction or obdurate obstinacy on the part of the Board, the Court of Appeals was not substituting its judgment of disputed factual issues for that of the lower Court; rather it accepted the District Court's own contemporaneous evaluation of crucial events, of the nature and degree of the many uncertainties surrounding the legal requirements prior to *Swann* and properly characterized the post-*Swann* evaluations of these circumstances as an exercise in hindsight on the part of the lower Court (472 F.2d 320-21; 163a).

³³ See *Bradley v. School Bd. of City of Richmond*, 325 F.Supp. at 834-43.

B.

**Viewed in its Totality, the Conduct of the School Board During
1970 and Thereafter Was Commendable and Constituted a
Determined Effort to Provide Full and Effective Relief
to the Petitioners.**

As the Court of Appeals has stated, in reviewing the exercise of judicial discretion on the part of a District Court in awarding counsel fees, "the matter must be judged in the perspective of all the surrounding circumstances."³⁴ Thus, during the relevant period of time in question,³⁵ *all* actions on the part of the School Board must be considered from which a definite pattern of intransigency must emerge. Those acts which arguably might be characterized as "evasive" or "obstinate" must be weighed against others which lend a decidedly contrary impression. In this regard, a number of relevant circumstances should be considered.

Rather than pressing the viability of its plan of freedom of choice, the School Board, in the face of strong public opposition, voluntarily abandoned that particular plan and chose instead to go forward with the task of devising a uni-

³⁴ *Bell v. School Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963).

³⁵ Even though the award in question involves reimbursement for fees and expenses incurred by the Petitioners from March 10, 1970, through January 29, 1971, the District Court made it clear that the School Board's conduct both before and after those times was relevant in that it purportedly tended "to show a consistent policy, pursued at all stages of the case" (53 F.R.D. at 33 n. 5; 121a).

With regard to prior conduct on the part of the School Board, in 1965, when this case involving the very question of the award of attorneys' fees was before the Court of Appeals, particular reference was made to the conduct on the part of the School Board as being commendable and exemplary rather than the type which historically had justified an award of counsel fees. *Bradley v. School Bd. of City of Richmond*, 345 F.2d 310, 313, 317, 319, 321 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965).

tary plan for the operation of its schools (28a). Thus, at a time when appellate litigation concerning the acceptability of freedom of choice plans was not uncommon,³⁶ the Board on March 31, 1970, further demonstrated its good faith as it declined an open invitation on the part of the District Court to embark upon a course of protracted litigation in defense of its freedom of choice plan. *Bradley, supra* 317 F.Supp. at 558.

The School Board through its administration promptly requested the staff of the Division of Equal Educational Opportunities of the United States Department of Health, Education and Welfare to prepare a plan which would "achieve the goal of a unitary system of public schools" in the City of Richmond (36a). Even though the District Court found the plan prepared by HEW to be deficient, the fact remains that the Board voluntarily sought the assistance of this federal agency in attempting to devise a unitary plan. This affirmative action on the part of the Board compares favorably with the actions of other school authorities in similar circumstances.³⁷

³⁶ *E.g.*, *Jackson v. Marvell School Dist. No. 22*, 416 F.2d 380, 385 (8th Cir. 1969) (attorneys' fees denied); *Felder v. Harnett County Bd. of Educ.* 409 F.2d 1070 (4th Cir. 1969) (attorneys' fees denied).

³⁷ For example, the Charlotte-Mecklenburg Board of Education had refused to accept the judicial suggestion that it consult with HEW experts which refusal the Court of Appeals felt led to certain deficiencies in that Board's plan for the desegregation of its elementary schools. *Swann v. Charlotte-Mecklenburg Board of Education*, 431 F.2d 138, 146 (4th Cir. 1970), *rev'd in part*, 402 U.S. 1 (1971). It is further significant that two members of the Court of Appeals had specifically commented on HEW participation in the formulation of desegregation plans as follows:

Although the definition of goals is for the court, HEW may be able to provide technical assistance in overcoming the logistical impediments to the desegregation of a school system. Thus it

Even though the HEW plan was found to be deficient, it is only through the application of hindsight that it fairly may be said that the School Board advocated a plan (HEW Plan) which it should have known was grossly inadequate at the time it was filed. The most definitive guidelines which the Board could have considered in its plan as required in the Fourth Circuit were as yet unannounced at the time of the preparation and filing of the HEW Plan on May 11, 1970.³⁸ Thus, the action of the Board in seeking and relying upon HEW's assistance in preparing a unitary plan could not be fairly characterized as other than a good faith effort to heed the precise suggestion that many courts were making at that very time.³⁹

The next plan proposed by the School Board on July 23, 1970, as the District Court found, *Bradley, supra* 317

was quite understandable that at the outset of this case *the District Court invited the Board to consult with HEW*. Desegregation of this large educational system was likely to be a complex and administratively difficult task, in which the expertise of the federal agency might be of help.

Swann, supra at 150 n. 3 (emphasis added).

³⁸ These first tentative guidelines were announced in opinions of the Court of Appeals on May 26 and June 22, 1970. See cases cited at note 40 *infra*.

³⁹ During the spring and summer of 1970 and beyond, federal courts frequently had ordered school boards to seek the assistance of HEW in the preparation of school desegregation plans, and in some instances, had directed that school boards implement HEW Plans. *E.g.*, *Monroe v. County Bd. of Educ.*, 439 F.2d 804, 806 (6th Cir. March 15, 1971); *Henry v. Clarksdale Mun. Sep. School Dist.*, 433 F.2d 387, 394 (5th Cir. August 12, 1970); *Boykins v. Fairfield Bd. of Educ.*, 429 F.2d 1234, 1235 (5th Cir. July 10, 1970); *Singleton v. Jackson Mun. Sep. School Dist.*, 426 F.2d 1364, 1369 (5th Cir. May 5, 1970), *modified*, 430 F.2d 368 (5th Cir.), *cert. denied*, 402 U.S. 944 (1971); *Willingham v. Pine Bluff, Ark. School Dist., No. 3*, 425 F.2d 121, 124 (8th Cir. April 29, 1970); *Banks v. Claiborne Parish School Bd.*, 425 F.2d 1040, 1042-43 (5th Cir. April 15, 1970).

F.Supp. at 573, was based substantially on decisions of the Court of Appeals in the preceding May and June.⁴⁰ Regardless of the District Court's retrospective view of the conduct of the Board in proposing this plan, the fact remains that the plan was approved for use on an interim basis during the 1970-71 school year because in the opinion of the lower Court, it fulfilled the Fourth Circuit's *Swann* test of reasonableness. *Bradley, supra* 317 F.Supp. at 575.

A review of the techniques employed by the School Board in its Interim Plan for the 1970-71 school year reveals that the guidelines offered by the Court of Appeals in *Swann* and *Brewer* were not only adhered to, but, in certain cases, exceeded. Pairing, clustering, non-contiguous zoning and cross-busing were utilized on both the high and middle school levels, whereas on the elementary level the only conceivable method that was not used was non-contiguous pairing involving extensive cross-busing (74a-78a). Even though the latter circumstance might, in retrospect, be termed a deficiency, such was certainly not the case under the law then current.⁴¹

⁴⁰ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138 (4th Cir., May 26, 1970), *rev'd. in part*, 402 U.S. 1 (1971); *Brewer v. School Bd. of City of Norfolk*, 434 F.2d 408 (4th Cir., June 22), *cert. denied*, 399 U.S. 99 (1970).

⁴¹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138, 142-43 (4th Cir. 1970), *rev'd. in part*, 402 U.S. 1 (1971). Other federal courts had explicitly held during the summer of 1970 that the law did not require school boards to implement plans necessitating the cross-busing of students to integrate schools. *E.g.*, *Green v. School Bd. of City of Roanoke*, 316 F.Supp. 6, 12 (W.D. Va. August 11, 1970), *modified*, 444 F.2d 99 (4th Cir. 1971); *Pate v. Dade County School Bd.*, 315 F.Supp. 1161, 1167 (S.D. Fla. June 26, 1970), *modified*, 434 F.2d 1151 (5th Cir. 1970). In remanding a number of cases which involved appellate arguments regarding the validity of desegregation plans which were inadequate in light of the pronouncements of this Court in *Swann*, the Court of Appeals explained its ac-

Furthermore, with the January 15, 1971 presentation of three different plans for the desegregation of its schools for 1971-72 (96a-99a), well in advance of this Court's decision in *Swann*, it was apparent that the School Board had done all within its power to fulfill its legal obligations (86a-91a, 96a-99a). See *Bradley*, *supra* 325 F.Supp. at 833-43. The basic objective underlying the preparation of the three plans was the desire on the part of the Board to have a reasonable plan before the District Court capable of implementation regardless of forthcoming actions on the part of this Court (88a-89a, 96a-98a). As the lower Court phrased it, the proposals "were designed to meet three possible measures of the extent of the School Board's legal duty which, it was foreseen, might emerge from pending cases in the Supreme Court." *Id.* at 831.

Neither of the first two alternative plans was accepted by the District Court. Plan I, based on the concept of "proximal geographic zoning," involved a consideration of transportation opportunities and physical barriers, boundaries and hazards, and was the least effective method of desegregating the Richmond schools.⁴² Plan II embodied

tions as follows: "We remand these cases because the respective district judges did not have the benefit of the Supreme Court mandate that adequate consideration be given 'to the possible use of bus transportation and split zoning.'" *Adams v. School Dist. No. 5, Orangeburg County*, 444 F.2d 99, 101 (4th Cir. 1971) (Per Curiam).

Other federal courts had approved the retention of some all-white or all-black schools owing to the existence of large black residential areas and the fact that all schools could not be reasonably integrated. *E.g.*, *Scott v. Winston-Salem/Forsyth County Bd. of Educ.*, 317 F. Supp. 453, 476-77 (M.D. N.C. June 25, 1970), *modified*, 444 F.2d 99 (4th Cir. 1971); *cf.* *Pate v. Dade County School Bd.*, 434 F.2d 1151, 1154 (5th Cir. August 12, 1970).

⁴² Had this Court in *Swann* authorized the retention of neighborhood schools at the elementary level, grades K-2, for instance, a portion of Plan I could have been utilized while other portions of Plan

most of the concepts utilized in the 1970-71 Interim Plan and would have been similarly effective in insuring the desegregation of schools in Richmond. *Id.* at 833-34.

The third plan proposed by the School Board in advance of this Court's decision in *Swann*, Plan III, however, was found by the Court to afford the promise of eliminating "the racial identifiability of each [school] facility to the extent feasible within the City of Richmond." *Id.* at 835. Plan III involved all means of desegregation available to the School Board including extensive busing, proximal geographic zoning, pairing, clustering, satellite zoning, and racial balance among faculties. *Id.* at 834. Certainly it is unlikely that any school board was as prepared in advance of *Swann* to implement the type of desegregation plan which incorporated all of the techniques which this Court subsequently approved for use in desegregating large city school systems.

As this Court is no doubt acutely aware, school boards have often used the appellate process as a means of postponing the implementation of obvious legal requirements relating to school desegregation. In this regard, the School Board's use of the appellate process throughout the period of time in question is highly significant.

Despite public opposition, there was no appeal undertaken with regard to the viability of the freedom of choice plan which the School Board had operated for a number of years. The Board also dropped the HEW Plan and proceeded to formulate another without seeking any appeal as to its acceptability. While justifiably appealing the District

II or III would have been sufficient for grades 3-12. (Hearings of March 4, 1971, Tr. 25; 101a). The School Board had recommended Plan II prior to *Swann* since there were substantial uncertainties as to whether the cross-town transportation of elementary students would ultimately be required (88a-89a, 97a).

Court's decision to the effect that its Interim Plan was a non-unitary one," the Board nevertheless declined to seek any stay and successfully implemented this plan within a period of two weeks. Unlike other school boards in the Fourth Circuit, the Board voluntarily withdrew its pending appeal after the *Swann* decision. Neither was any stay or appeal pursued by the School Board either from the adverse decisions of the lower Court with regard to the injunction against further school construction in the City of Richmond, *Bradley*, *supra* 324 F.Supp. 461, or from the April 5, 1971 order requiring the implementation of Plan III which necessitated the purchase of a substantial number of buses. *Bradley*, *supra* 325 F.Supp. 828. The Board sought only a modification of the District Court's April 5th order temporarily postponing immediate compliance based on its representation that it would acquire sufficient transportation facilities and could effect an orderly implementation of Plan III within the time required." The basis for the requested modification centered around the School Board's

⁴³ Acting favorably on a School Board motion, the Court of Appeals postponed briefing in that matter pending rulings by this Court on the school desegregation cases then before it. In characterizing the Board's motion to delay the briefing schedule, the District Court has commented as follows: "Their original requests to the Fourth Circuit that the matter lie in abeyance were undoubtedly based on valid and compelling reasons, and ones which the Court has no doubt were at the time both appropriate and wise, since defendants understandably anticipated a further ruling by the United States Supreme Court in pending cases. . . ." *Bradley*, *supra* 325 F.Supp. at §32.

⁴⁴ In statements regarding previous conduct on the part of the School Board, the Court of Appeals recognized "[t]hat a defendant acquiesces in the adverse findings of the District Court and brings itself into compliance with the District Court's opinion before its affirmance on an appeal in which they are uncontested by the defendant is reason for some commendation and not for censure." *Bradley v. School Bd. of City of Richmond*, 345 F.2d 310, 319 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965).

view that the order of immediate compliance should have been deferred pending this Court's decision in *Swann*.

Thus, while preserving its rights under an appeal from the lower Court's order of August 17, 1970, the School Board sought no stays regarding implementation, and there is no evidence that it at any time attempted to use the appellate process as a delaying tactic.

Finally, it can be stated that the Board has made the utmost effort to secure both effective and complete relief for the Petitioners herein despite opposition and criticism from many quarters.

With the presentation of its Interim Plan on July 23, 1970, the Board made an honest effort to institute a system of unitary schools for the City of Richmond in conformity with the test of reasonableness which at that time was the measure of its legal obligation in the Fourth Circuit. Following the District Court's approval of the Interim Plan, the School Board overcame substantial logistical problems and public disfavor as well, in executing a rapid and substantial transformation of its school system in order to insure the timely opening of its schools on August 31, 1970.

Following the above actions, however, it became even more apparent that the Board would be unable to insure the Petitioners complete and effective relief within the confines of the Richmond system alone. Faced with this reality and despite overwhelming public opposition, the Board instituted proceedings on November 4, 1970, to join various State school authorities, as well as authorities from the adjacent Counties in an effort to afford the full measure of relief. *Bradley v. School Board of City of Richmond*, 51 F.R.D. 139, 140 (E.D. Va. 1970) (ordering joinder of additional parties-defendant and ordering filing of amended complaint by Petitioners). These proceedings were actively

and vigorously pursued by the School Board at all stages (176a).

Such an effort simply cannot be reconciled with the findings of the District Court characterizing the Board's actions and conduct, as it is probable that no other urban school authority has expended as much energy in attempting to bring fulfillment to its beliefs as to the promises of *Brown I* (154a-159a).

The School Board thus respectfully submits that when all of the facts and circumstances surrounding its conduct are viewed in the proper perspective, the Court of Appeals was eminently justified in concluding that it was "unfair to find under these circumstances that [the Board] was unreasonably obdurate" (472 F.2d 327; 177a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed and the case remanded to the District Court for appropriate action in accordance with its memorandum opinion of June 22, 1971 (153a).

Respectfully submitted,

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APPENDIX

**Pertinent Legislative History Surrounding the Enactment of
Section 718 of the Emergency School Aid Act of 1972**

SUMMARY

Emergency school aid legislation was first introduced in the House of Representatives as early as September, 1970 (3a), and legislation authorizing awards of attorneys' fees first reached the floor of the House in October, 1971 (4a). The provision there introduced was in all respects similar to the present Section 718 except that it included an allowance for a prevailing defendant as well as for a prevailing plaintiff (4a). This provision failed to pass under a suspension of the rules and was effectively killed (4a-5a). Since nowhere in the legislative history of this particular provision is there any mention of how it was intended to operate, the presumption of prospective application of the present Section 718 is still controlling.

Similar legislation first appeared in the Senate as a portion of the "Quality Integrated Education Act," S. 683, introduced by Senator Mondale in February of 1971 (5a). The portion of this legislation dealing with awards of attorneys' fees differs from the present Section 718 in several respects. The Mondale version provided for federal funding of the awards, made them mandatory rather than discretionary, and provided that they should be "for services rendered, and costs incurred, after the date of enactment of this Act" (5a).

In the Committee Report of the Mondale bill, it is significant that there are two clear indications that the Committee intended the award to apply prospectively only. First, the Report mentioned "additional efforts to insure

¹ H.R. Rep. No. 92-576, 92nd Cong., 1st Sess. (1971) (11a).

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compliance with the requirements under this bill and under Title I of the Elementary and Secondary Education Act of 1965.”² Clearly, the inclusion of the words “for additional efforts” refers to future efforts and legal services rendered after the enactment of the particular statute. Furthermore, in the section-by-section analysis of the same report, an intention that the awards in question were to be made prospectively only is explicit. In analyzing the section dealing with the award of attorneys’ fees, the Committee indicated that the award should be made “for services rendered, and costs incurred, after the date of enactment of the Act...”³ The language here is unequivocal. Thus where federal funding was included, the clear and unambiguous intention of the Committee was that only legal services rendered after the enactment of the statute were to be reimbursable under its provisions. Debates on the Senate bill containing the above provision led to a floor amendment which was virtually identical to the present Section 718 (8a-9a). In this amendment, of course, all language concerning federal funding was deleted. Even though during the floor debates concerning the new amendment, the question of how the attorneys’ fees provision was to operate was not discussed, the language of the above Committee Report remains as the last specific reference in the legislative history regarding the intent of Congress as to how Section 718 is to operate.⁴

Following the foregoing action on the early Senate versions of present Section 718, the House of Representatives in

² S. Rep. No. 92-61, 92nd Cong., 1st Sess. (1971) (12a).

³ *Id.* at 55 (15a-16a).

⁴ This Court has indicated that it viewed a Committee Report as representative of “the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.” *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

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November of 1971 attached its Emergency School Aid Act, H.R. 2266, to the Senate Higher Education Act and passed the bill as amended (9a-10a). The attorneys' fees provision was deleted from the House amendment, re-inserted by the Senate Committee on Labor and Public Welfare which substituted its Emergency School Aid Act, S. 1557, for the House provisions, and subsequently adopted pursuant to Senate and House Conference Reports approved in May and June of 1972, respectively. (10a).

DETAILED HISTORY

The Education Amendments Act of 1972, Public Law 92-318, 86 Stat. 235, as enacted is an amalgamation of several proposed measures, principally a higher education bill and an emergency school aid bill. Section 718 is in the emergency school aid portion of the Act and its legislative history is found in those bills which went to make up that portion.

The House Emergency School Aid Bill

Emergency school aid legislation was introduced into the 91st Congress as H.R. 19446 on September 24, 1970. The bill as introduced and as reported by the House Education and Labor Committee on November 30, 1970,⁵ contained no mention of attorneys' fees and was not passed by the Congress.

This legislation was reintroduced into the 92nd Congress on January 26, 1971, as H.R. 2266, and once again referred to the Education and Labor Committee. Although the bill as referred contained no attorneys' fees provision, the Committee struck all after the enacting clause and amended it

⁵ H.R. Rep. No. 91-1634, 91st Cong., 2d Sess. (1970).

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to include an authorization for a federal court, in its discretion, to grant attorneys' fees to either successful plaintiffs or defendants in school desegregation litigation. This Section read:

Section 17: Upon the entry of a final order by a court of the United States in litigation against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), seeking compliance with any provision of this Act or alleging discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost upon a finding that the proceedings were necessary to bring about compliance. Where the prevailing party is the defendant and is a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), the court, in its discretion, may allow such prevailing party a reasonable attorney's fee as part of the cost upon a finding that the proceedings were unnecessary to bring about compliance.

The Committee reported the bill as amended to the House on October 19, 1971,^{*} with a short explanatory note on attorneys' fees (11a). The report contains no mention of intended retroactive application of the attorneys' fees portion. From the fact that it speaks of allowance of fees in actions, "seeking compliance with any provision of this act," and since the act was not yet law, an indication against retroactivity is shown. On November 1, 1971, H.R.

^{*} H.R. Rep. No. 92-576, 92nd Cong., 1st Sess. (1971) (11a).

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2266 failed to pass under suspension of the rules, and was effectively killed.

Senate Measures for Attorneys' Fees

In the Senate on February 9, 1971, Senator Mondale introduced S. 683, styled as the "Quality Integrated Education Act of 1971." Section 11 of this bill as introduced dealt with attorneys' fees and read:

(a) Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the Department of Health, Education and Welfare for failure to comply with any provision of this Act, title I of the Elementary and Secondary Education Act of 1965 or discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or of the fourteenth article of amendment to the constitution of the United States as they pertain to elementary and secondary education, such court shall award, from funds reserved pursuant to section 3(b)(1)(C), reasonable counsel fee, and costs not otherwise reimbursed, for services rendered, and costs incurred, after the date of enactment of this Act to the party obtaining such order.

(b) The Commissioner shall transfer all funds reserved pursuant to section 3(b)(1)(C) to the Administrative Office of the United States Courts for the purpose of making payments of fees awarded pursuant to subsection (a).

The bill was referred to the Senate Committee on Labor and Public Welfare, where it was considered along with S. 195, the "Emergency School Aid Act of 1971," and S. 1283, the "Urban Education Improvement Act of 1971." The Committee drew from all bills and developed a new

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bill, S. 1557, as an amalgam of all of them.⁷ S. 1557 contained the attorneys' fees language of the Mondale bill, S. 683, with two additions: it added a requirement that the court find that the proceedings were necessary to bring about compliance, and on a motion of Senator Javits, it added at the end of Subparagraph (a) the words:

In any case in which a party asserts a right to be awarded fees and costs under such section, the United States shall be a party with respect to the appropriateness of such award and the reasonableness of counsel fees.

The portions of the Mondale bill, S. 683, and S. 1557 necessary to effectuate the concept of federal funding, including the proviso "for services rendered, and costs incurred, after the date of enactment of this Act," plus the Javits amendment to S. 1557 are consistent with an intention of prospective application only.

The Committee reported S. 1557 on April 14, 1971.⁸ This Report contains no indication of congressional intent for retroactivity of this section. In fact, in at least two places it clearly indicates that fees were intended to be awarded only for services rendered subsequent to passage of the Act. In its discussion of attorneys' fees on page 25, the report states:

Of the sums authorized by the bill, \$15 million is set aside for *additional efforts* to insure compliance with requirements under this bill and under Title I of the Elementary and Secondary Education Act of 1965 (compensatory education for disadvantaged children) and for vigorous nation-wide enforcement of Constitu-

⁷ S. Rep. No. 92-61, 92nd Cong., 1st Sess. at 5-6 (1971).

⁸ *Id.* (12a-16a).

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tional and statutory protection against all forms of discrimination based upon race, color and national origin in elementary and secondary education (12a) (emphasis added).

Clearly the inclusion of the words "for additional efforts" refers to future efforts and to services to be rendered after enactment of this act.

In the section-by-section analysis, however, the intention that the awards were to be prospective only is explicit:

This section states that upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the Department of Health, Education and Welfare, for failure to comply with any provision of the Act, or of title I of the Elementary and Secondary Education Act of 1965, or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964 or of the Fourteenth Article of amendment to the Constitution of the United States as they pertain to elementary and secondary education, such court shall, upon a finding that the proceedings were necessary to bring about compliance, award, from funds reserved pursuant to Section 3(b)(3), reasonable counsel fees, and costs not otherwise reimbursed for services rendered, and costs incurred, after the date of enactment of the Act to the party obtaining such order.... (15a-16a).

The language here is unequivocal. The last specific reference in the legislative history manifests the clear and unambiguous intention of the Committee that only services rendered *after* the enactment of the act were to be reimbursed. Significantly, there is no indication that any member of Congress voiced any objection to this concept.

Senator Dominick of Colorado was particularly adamant

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in his opposition to the attorneys' fees provision of S. 1557. He moved to strike this portion of the bill in Committee, but his motion was rejected 10-5.⁹ Additionally, he published his individual views in opposition to the Section at pages 61 to 63 of the Committee Report. Here he outlined his reasons for opposition to this section: its lack of discretion for the courts, its excessive coverage, its stimulus for unjustified litigation, its excessive funding, and its overlap with current remedies. Nowhere in his vigorous dissent was retroactivity even discussed. It is reasonable to assume that Senator Dominick in his strong opposition to any provision for attorneys' fees would have marshalled all conceivable arguments in support of his position. Certainly, had the possibility of retroactive application been even remotely contemplated, it seems highly unlikely that the Senator would have failed to mention this in his efforts to gain additional support on an issue which had sharply divided the Senate.

S. 1557 as reported from Committee was first debated on the floor of the Senate on April 21, 1971. On that date, Senator Dominick again moved to strike the attorneys' fees portion from the bill. After debate on the motion, the Senate voted 47 to 38 to strike it.¹⁰ At no time during the discussion or debate was the matter of retroactivity discussed.

On the following day, Senator Cook of Kentucky introduced a floor amendment, which, with the exception of "act" for "title," was identical in language to the present Section 718.¹¹ The amendment was debated April 22, and

⁹ *Id.* at 29.

¹⁰ 117 CONG. REC. 5324-31 (daily ed. April 21, 1971).

¹¹ 117 CONG. REC. 5483-84 (daily ed. April 22, 1971).

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again on April 23, when it was approved by the Senate 30 to 24.¹² Senator Dominick did not vote on this measure. Senate debate on the Cook amendment centered on charges of encouragement of champerty, and unnecessary litigation. No consideration was given to the question of retroactivity. The new section (Cook amendment) as adopted differed from the section reported from the Committee (a part of S. 1557) in two material respects: It put the award of fees within the discretion of the Court, and eliminated all language concerning federal funding including the proviso "for services rendered, and costs incurred, after the date of enactment of this act."

On April 26, 1971, the Senate passed S. 1557 and sent it to the House.

The Integration of the Higher Education and Emergency School Aid Acts

On November 3 and 4, 1971, the House of Representatives was considering H.R. 7248, its higher education bill. The House approved an amendment by Mr. Pucinski, adding the text of the Emergency School Aid Act (H.R. 2266) to the Higher Education Bill. The entirety of H.R. 2266, which it had failed to pass under a suspension of the rules on November 1, was added with five basic changes.¹³ The most crucial of these changes was the *omission* of a provision for attorneys' fees. The House passed H.R. 7248 as amended, but subsequently vacated this passage and passed in lieu thereof an earlier version of the Senate Higher Education Bill. Thus, in effect, the House Emergency School Aid Bill

¹² 117 CONG. REC. 5536-38 (daily ed. April 23, 1971).

¹³ See 117 CONG. REC. H 10427-32 (daily ed. Nov. 4, 1971).

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was appended to an early version of the Senate Higher Education Bill.

On November 24, 1971, the House-passed bill was referred to the Senate Committee on Labor and Public Welfare, which struck the House amendment (formerly H.R. 2266) and substituted for it the Senate version of the Emergency School Aid Bill, S. 1557. This portion, composing Title VII of the bill, contained provisions for attorneys' fees as passed in the Cook amendment discussed above. The bill, as reported from Committee on February 7, 1972,¹⁴ was agreed to by the Senate on March 1, 1972, and the matter went to conference.

The conference accepted the Senate version of the bill regarding attorneys' fees (16a)¹⁵; however, the conference reports¹⁶ contained only passing reference to the attorneys' fees provisions, and no discussion of whether retroactivity was intended.

The Senate adopted the conference report on May 24, 1972; the House adopted it on June 8, 1972.

Effective Date Provisions

In the general provisions portion of the Act as adopted, Section 2(c)(1) provides for effective dates:

Unless otherwise specified, each provision of this Act and each amendment made by this Act shall be effective *after June 30, 1972*, and with respect to appropriations for the fiscal year ending June 30, 1972, and succeeding fiscal years. (emphasis added)

¹⁴ S. Rep. 92-604, 92d Cong., 2d Sess. (1972) (no mention of attorneys' fees).

¹⁵ S. Rep. No. 92-798, 92nd Cong., 2d Sess. (1972); H.R. Rep. 92-1085, 92d Cong., 2d Sess. (1972).

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This delayed effective date provision further buttresses the position that no retroactivity was intended by the Congress. Surely, the wording that the provisions "shall be effective after June 30, 1972," cannot be read to indicate any intent of retroactivity.

EXCERPTS FROM H.R. REP. NO. 92-576, 92d CONG., 1st SESS. (1971) ATTORNEYS' FEES

The Committee bill provides that a Federal court may allow a successful plaintiff a reasonable attorney's fee in an action against a local educational agency, a State, or the Federal Government in a suit seeking compliance with any provision of this Act, Title VI of the Civil Rights Act, or the fourteenth amendment of the Constitution upon finding that the proceedings were necessary to bring about compliance.

The Committee bill also allows payment of a reasonable attorney's fee to a successful defendant in such a case upon a finding that the proceedings were unnecessary to bring about compliance. [p. 18]

ATTORNEYS FEES

Section 17. This section authorizes a court of the United States to award reasonable attorney's fees to the prevailing party, upon its entry of a final order against a local educational agency, a State, or the United States, for a failure to comply with this act or for violation of title VI of the Civil Rights Act of 1964, or of the 14th amendment to the Constitution of the United States as they pertain to discrimination on the basis of race, color, or national origin in elementary and secondary education. This section also authorizes payment of reasonable attorney's fees to a successful defendant in such a suit. [p. 23]

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EXCERPTS FROM S. REP. NO. 92-61, 92d CONG., 1st SESS. (1971) ATTORNEYS' FEES

Of the sums authorized by the bill, \$15 million is set aside for additional efforts to insure compliance with requirements under this bill and under Title I of the Elementary and Secondary Education Act of 1965 (compensatory education for disadvantaged children) and for vigorous nation-wide enforcement of Constitutional and statutory protection against all forms of discrimination based upon race, color and national origin in elementary and secondary education.

These laws are not now being enforced throughout the nation. The Federal government is devoting neither the time, effort nor the financial resources necessary for adequate law enforcement. For example, the budget of the Justice Department's Civil Rights Division for education activities amounts to only \$1 million a year. Only six school desegregation suits have been brought in Northern and Western states by the Justice Department. Only nine school districts in Northern and Western states have been required to file desegregation plans under Title VI of the Civil Rights Act of 1964. The Committee believes that funds should be made available to assure that Federal laws will be enforced throughout the country, while at the same time, under the policies and programs set forth in this bill, voluntary efforts to achieve quality education in stable integrated environments are assisted throughout the nation.

Although litigation directed toward the enforcement of these laws is often time consuming and therefore expensive, litigation on behalf of those injured by breach of legal requirements remains the most effective and economical method of which the Committee is aware to obtain protection of legal rights.

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Therefore Section 3(b)(3) reserves 1% of the funds authorized under the bill (\$5 million for the period ending June 30, 1972 and \$10 million for the fiscal year ending June 30, 1973) for the payment under Section 11 of attorneys' fees, and costs not otherwise reimbursed, in successful law suits for failure to comply with the provisions of this bill, Title I of the Elementary and Secondary Education Act of 1965 (compensatory education for disadvantaged children) or discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964 or the 14th Amendment to the United States Constitution, as they pertain to elementary and secondary education. These funds will remain available until expended.

Section 11 will not give rise to frivolous or vexatious litigation. Fees may be awarded only for successful litigation and only upon the court's finding that litigation was necessary to bring about compliance with law.

The provision does not assign an unfamiliar task to Federal district courts. Courts now determine the reasonableness of attorneys fees and costs in a variety of cases, including suits under Title II (public accommodations) and VII (equal employment) of the Civil Rights Act of 1964, and Title VIII (fair housing) of the Civil Rights Act of 1968. In determining the fees and costs, courts commonly employ the minimum bar fee scale established by the area bar association.

Unlike the provisions mentioned above, Section 11 does not require the losing party to pay the fee and costs. Since a fee awarded against a school district would be paid from the next year's education budget, harming all the children within the district, Section 11 provides that these fees and costs will be paid with Federal funds. While it might be

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unfair to assess fees against school districts, it is still more unfair to require students and teachers impaired by racial discrimination to bear themselves the heavy costs of litigation, while the defense is financed from public funds.

Nor does Section 11 impose an unfamiliar burden upon the Administrative Office of the United States Court, since the Office performs a similar function under the Criminal Justice Act.

Funds reserved under Section 4(b)(3) are to be transferred by the Commissioner to the Administrative Office of the United States Courts. Fees will be awarded by order of the United States District Court. The Administrative Office will honor the court order. The Administrative office presently performs a similar function with regard to funds reserved for payment of fees to attorneys who represent indigent criminal defendants under the Criminal Justice Act.

The court will award fees and costs upon the entry of a final order. An order should be considered final when it is no longer subject to direct appeal, and payment should be made with respect to that order even if it does not dispense with all of the issues raised by the litigation. Those costs which would be assessed against the defendant under present practices and conditions would continue to be so assessed. Other costs (for example, fees of expert witnesses) not reimbursed under present practice may be paid from the Federal fund.

Where fees and costs are to be assessed against the defendant, the defendant has an interest in insuring that the court is fully informed so that excessive fees are not awarded. Since fees under this Section are to be assessed against a public fund, Section 11 provides that the United States shall be a party with respect to proceedings to determine attorneys fees. This provision permits the United States Attorney

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or another representative of the Justice Department to argue against the payment of excessive fees and costs will not be paid or to argue that the litigation was not necessary to bring about resolution of the issues involved.

It is expected that Section 11 will encourage the private bar to exercise its responsibilities in an area of litigation crucial to the public interest and provide the best possible insurance that funds authorized under this bill will be expended in accordance with law.

The Committee does not view provision for payment of legal fees in successful private litigation as a substitute for continued Federal evaluation and enforcement efforts, but such provisions essential, to increase the ability of the legal system to correct abuse of Federal programs designed to help children subjected to racial discrimination and poverty related disadvantage. [p. 25-27]

Section 11—Attorneys' Fees

This section states that upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the Department of Health, Education and Welfare, for failure to comply with any provision of the Act or of title I of the Elementary and Secondary Education Act of 1965, or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964 or of the Fourteenth Article of amendment to the Constitution of the United States as they pertain to elementary and secondary education, such court shall, upon a finding that the proceedings were necessary to bring about compliance, award, from funds reserved pursuant to section 3(b)(3), reasonable counsel fees, and costs not otherwise reimbursed for services rendered, and costs incurred, after the date of enactment of

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the Act to the party obtaining such order. In any case in which a party asserts a right to be awarded fees and costs under section 11, the United States shall be a party with respect to the appropriateness of such award and the reasonableness of counsel fees. The Commisioner is directed to transfer all funds reserved pursuant to section 3(b)(3) to the Administrative Office of the United States Courts for the purpose of making payments of fees awarded pursuant to section 11. [p. 55-56]

EXCERPT FROM S. REP. NO. 92-798, 92d CONG., 2d SESS. (1972)

Attorney fees.—The Senate amendment, but not the House amendment, authorized the payment of attorneys fees to successful plaintiffs in suits brought for violation of this title, Title VI of the Civil Rights Act, or the fourteenth amendment to the Constitution. The conference substitute contains this provision. [p. 218]

SUPREME COURT, U. S.
IN THE

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Supreme Court of the United States

October Term, 1973

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I

Respondents urge at length that Section 718,¹ which became effective over 17 months ago, should not now be applied to this case because such an application would be "retroactive". They maintain that federal statutes should not be applied to any cases or appeals pending when the statutes became effective, even though such cases may not be finally decided until many years after that effective date.

Respondents' assertion is not a novel one: their position has been fully litigated, and resoundingly rejected, by this Court in the past. In *Housing Authority of City of Durham v. Thorpe*, as here, the lower court held that a new federal law should not be applied to litigation pending on appeal. Compare 271 N.C. 468, 470, 157 S.E. 2d 147, 149 (1967) with *Thompson v. School Board of City*

¹ Section 718 is now codified in 20 U.S.C. § 1617.

of *Newport News*, 472 F. 2d 177 (4th Cir. 1972). In *Thorpe*, as here, reliance was placed on *Greene v. United States*, 376 U.S. 149 (1964) by those opposing application of the new law. Compare 271 N.C. at 470-471, 157 S.E. 2d at 149-150 with Respondents' Brief, pp. 10-13. In *Thorpe*, as here, the respondents construed *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) as precluding application of the new law. Compare Brief for Respondents in No. 1003, 1967 Term, p. 27, with Brief for Respondents, pp. 15-18. Yet in *Thorpe* this Court rejected the identical arguments reasserted in this case, and held unanimously that the new federal law must be applied to that pending appeal. *Thorpe* reiterated it was the "general rule" that new laws must be applied to all cases pending on appeal, 393 U.S. at 281, and that *Greene* was an "exception" needed to prevent manifest injustice on the special facts of that case. 393 U.S. at 282. Respondents offer no reason why that exception should now become the general rule.

Respondents suggest that the sole reason this Court applied the new law in *Thorpe* was that Mrs. Thorpe, at the time of the decision, still had not been evicted from her apartment. Respondents' Brief, p. 19. The majority in *Thorpe* reaffirmed the rule that new laws were to be applied to pending appeals without referring to the fact that Mrs. Thorpe had not been evicted. That fact was noted only to show the unreasonableness of the Housing Authority's refusal to comply voluntarily with the new law. Only Mr. Justice Black, in a concurring opinion, gave significant weight to this factor, and he objected that the rest of the Court, in discussing the more general question of applying new laws on appeal, had used "a cannon to dispose of a case that calls for no more than a pop gun." 393 U.S. at 284. Mr. Justice Black correctly understood the difference between his concurring opinion

and the majority opinion joined in by the other eight members of the Court; the restricted construction of *Thorpe* urged by Respondents is precisely the narrow ground on which Mr. Justice Black urged unsuccessfully that the Court base its opinion.

Respondents further urge that new statutes are applied to pending cases only where there is "a clear legislative intent" to affect such cases, and that a finding of such legislative intent was crucial to the decision in *Thorpe* and related cases. Respondents' Brief, pp. 11, 18. This is simply wrong. In *Thorpe* the new law was a HUD circular regarding eviction procedures in federally assisted public housing; the *Thorpe* opinion contains absolutely no discussion of whether those who drafted the circular intended to cover pending litigation. 393 U.S. at 281-284. So, too, in *United States v. Alabama*, 362 U.S. 602 (1960), the new statute was a provision of the 1960 Civil Rights Act authorizing suits by the United States against a state. This Court applied the new statute to that pending appeal without any reference to the legislative history of or congressional intent behind the 1960 Act. See Petitioners' Brief, p. 12. In *Ziffin v. United States*, 318 U.S. 73, (1943), the new statute was an amendment to the Interstate Commerce Act. This Court applied the change to a case pending before the Interstate Commerce Commission on the date of its enactment, without purporting to consider whether Congress intended the new law to apply to such already pending matters.

Furthermore, the application of Section 718 to the instant case would not be a "retroactive" application, properly so called. Such application would be truly retroactive only if, in the case involved, the question of attorneys' fees had been litigated and all appeals exhausted before Section 718 became effective. See, e.g., *Williams v. Kimbrough*,

415 F.2d 874 (5th Cir. 1969), *cert. denied* 396 U.S. 1061 (1970).² Whether a final order regarding legal fees could be *reopened* because of Section 718 is a question not presented in the instant case, and which this Court is not required to decide.

Respondents suggest there may be a substantial number of ongoing school desegregation cases in which the question of legal fees has never been resolved, and they speculate that in some of these cases it might be unfair to award counsel fees. Respondents' Brief, pp. 20-30. The district courts, however, have ample authority to deal with any such problem. Attorneys' fees under Section 718 may be denied if "special circumstances would render such an award unjust", *Northcross v. Board of Education of Memphis*, 412 U.S. 427, 428 (1973), and a court of equity has similar discretion where legal fees would otherwise be appropriate for a private attorney general or under *Hall v. Cole*, 412 U.S. 1 (1973). In the instant case, however, the District Court expressly held there were no special circumstances which might render unjust an award of legal fees. 140a.

II

A majority of the Court of Appeals below held Section 718 inapplicable to the instant case on the alternative ground that it was not awarded "upon the entry of a final order" against the Respondents, 187a-188a. The error of this holding was dealt with in Petitioners' Brief, pp. 10-11. Respondents, apparently recognizing that the position of the Court of Appeals is inconsistent with the language of

² Similarly, *Thorpe* would have been a retroactive application, not if Mrs. Thorpe had been evicted before this Court's decision, but only if all appeals had been exhausted and certiorari denied before the HUD circular was issued.

Section 718 and the facts of this case, have abandoned that position and declined to offer any argument in support of this aspect of the Fourth Circuit's opinion.

III

Respondents do not seriously contest Petitioners' argument that, under *Hall v. Cole*, 412 U.S. 1 (1973), a plaintiff who successfully sues to end unlawful or unconstitutional government action should in general have his counsel fees paid by the defendant if the lawsuit conferred a significant benefit upon the public at large or upon the government itself. See Petitioners' Brief, pp. 21-28. Similarly, Respondents do not dispute Petitioners' contention that the defendant should pay the legal fees of a successful plaintiff where the litigation served to vindicate important congressional or constitutional policies. See Petitioners' Brief, pp. 28-34. While tacitly conceding that counsel fees should generally be awarded in successful civil rights litigation, Respondents urge that an *exception* should be made for school desegregation cases. Respondents argue that this Court should adopt, in litigation enforcing the commands of *Brown v. Board of Education*, 347 U.S. 483 (1954), a special rule "more restrictive than might otherwise be appropriate in *other* suits brought under Section 1983." Respondents' Brief, p. 21.

It is difficult to understand why school boards which persist in defiance of the Constitution until directed to desist by the federal courts should be exempted from paying the legal fees of the victims of that unlawful conduct, especially when all other state and local agencies must pay such fees in similar circumstances. The affirmative obligation of school officials to devise effective methods of desegregation is no new development; eighteen years ago this

Court declared that school officials were responsible for "solving" the practical problems of desegregation, *Brown v. Board of Education of Topeka*, 349 U.S. 294, 299 (1954), and eight years ago in this very case this Court declared that "[d]elays in desegregating school systems are no longer tolerable." *Bradley v. School Board of Richmond*, 382 U.S. 103, 105 (1965). See also *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969). Neither can it be asserted that the rights involved in these cases are relatively unimportant; on the contrary, the stigma of a second-class segregated education is certain to stunt the intellectual and spiritual development of black students "in a way unlikely to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). Nor are school desegregation cases so easy to litigate or so short of duration as to render legal fees unnecessary; almost two decades of experience under *Brown* has shown all too clearly that such litigation is often fiercely contested and that adequate relief is often won only after years of effort. Of all types of civil rights litigation in which legal fees might be sought under *Hall v. Cole* or the private attorney-general theory, the claim for such fees is undoubtedly strongest in a case such as this.

Alternatively, Respondent urges that even if *Hall v. Cole* and the private attorney general theory are applicable to school litigation, it would not be "wise" for this Court to so hold since certain future school cases will be controlled by Section 718. Respondents' Brief, pp. 26-30. This litigation presents a case or controversy, and unless legal fees are awarded on some other basis the applicability of *Hall v. Cole* and the private attorney general standard must be considered and decided. Certiorari was appropriate in this case because of the conflict between the opinion of the Fourth Circuit and eleven other lower court decisions

regarding the private attorney general rule. Petition for Writ of Certiorari, pp. 18-27. That conflict should not continue to languish unresolved. Respondents would have this Court conclude that, while Petitioners might have been entitled to legal fees if Section 718 had not been enacted, Congress' decision in 1972 to *assure* the award of legal fees should have the effect of *preventing* the award of fees in all cases arising before Section 718 became effective. Such a restrictive result would hardly be consistent with the purposes of Section 718.

IV

Respondents urge throughout their brief that the award of counsel fees in this case, or in general, is unfair because of "uncertainty" which existed prior to this Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Petitioners maintain that any such uncertainty is irrelevant to the award of fees in this or any other case. Even if it were relevant, whether a particular school board's conduct was the result of any uncertainty, or due to other causes, is a question of fact peculiar to each case. There is nothing in the record in this case to indicate that the school board failed to act for two years after *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) because of any such uncertainty. There is nothing in the record in this case to indicate that, after the Fourth Circuit's decision in *Swann*, the school board continued to propose unacceptable plans because of uncertainty as to whether this Court would grant certiorari in *Swann*.

It was never claimed in the District Court, and no court has ever held, that the actual reason the school board took no action in the fact of *Green* in 1968 was that it had no

complaints or did not know what to do. The school board never asserted that it spent the 22 months after *Green* trying to formulate a new desegregation plan; once litigation commenced, the board was able to devise its first proposed plan in 41 days, and its second in 27. On the contrary, as late as March, 1970 the school board was still equivocating as to the meaning of *Green*, p. 115a, and the District Court found that the general attitude of the authorities was that they would take no steps to establish a unitary school system except under court order. P. 133a, see also p. 114a n.1. Whatever "uncertainties" existed before or after *Swann* were as to the tools which the courts could use when state officials failed to comply with the law. The tools available to school officials themselves are limited only by their imagination and practical considerations; school boards have always been free to adopt any techniques which worked, even though some might be beyond the power of the federal courts to order. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971). The goal to be achieved has always been clear—the creation of a unitary school system. Compare *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). Any uncertainty on the part of the board as to how to achieve a unitary system cannot excuse the board's decision not to try to achieve such a system at all.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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SUPREME COURT, U. S.

NOV 30 1973

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No. 72-1322

In the Supreme Court of the United States

OCTOBER TERM, 1973

CAROLYN BRADLEY, ET AL., PETITIONERS

v.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the district court had authority to award attorneys' fees for the plaintiffs' successful efforts in obtaining injunctive relief to require their school board to adhere to its constitutional and statutory duty to desegregate the public schools.

INTEREST OF THE UNITED STATES

Lawsuits by private parties are an important supplement to the program of the United States for enforcing Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c, as well as other civil rights statutes. School desegregation suits are private in form only;

the relief obtained is in vindication of a national policy of high priority. The availability of attorneys' fee awards necessarily expands the scope of enforcement and augments the resources of the federal government in civil rights cases. Cf. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210.

Congress has recognized that the Nation must in large measure rely upon private litigation as a means of securing compliance with civil rights laws and the constitutional requirements they reflect. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401. For example, Congress has expressly limited the Attorney General's authority to sue in the school desegregation area to instances where the Department of Justice has received a written complaint and certifies that the complainant cannot initiate and maintain litigation on his own. 42 U.S.C. 2000c. Also, Congress has expressly authorized the award of counsel fees in several civil rights statutes. See, e.g., 42 U.S.C. 2000a-3(b) (public accommodations), 2000e-5(k) (employment), and 3612 (housing).¹ The efficacy of private litigation in these fields has significant implications for the responsibilities and resources of the United States.

The United States, however, is not likely to be directly affected by the decision in this case in its capacity as a litigant because Congress has provided that, except where specifically authorized by statute (see, e.g., n. 2, *infra*) attorneys' fees shall not be included in a judgment for costs in a civil action by or against the United States or any agency or official thereof acting in his official capacity. 28 U.S.C. 2412.

¹ See also n. 2, *infra*.

STATEMENT

The facts are described in detail in the briefs of the parties. We summarize here only the procedural history of this litigation.

This class action, commenced in 1961, sought equitable relief requiring the School Board of the City of Richmond, Virginia, to desegregate the Richmond public schools (App. 113a, 160a-161a, n. 1). The case before this Court concerns solely the propriety of the award to petitioners of attorneys' fees for desegregation litigation concerning the schools in Richmond for the period from March 10, 1970, to January 29, 1971 (App. 121a, n. 5).

In a prior stage of this litigation the district court had approved a "freedom of choice" plan to desegregate the Richmond public schools. See *Bradley v. School Bd.*, 345 F. 2d 310 (C.A. 4), remanded on other grounds, 382 U.S. 103. On May 27, 1968, however, this Court held that freedom of choice plans were constitutionally inadequate unless they actually resulted in a unitary desegregated school system, and the Court imposed on school boards the affirmative duty to "come forward" with realistic plans to achieve such systems "now." *Green v. County School Bd.*, 391 U.S. 430, 438-441. Despite the apparent inadequacy of the then-existing plan, the unconstitutionality of which was eventually conceded (App. 114a), the respondent school board failed to adopt a new plan that would satisfy the applicable constitutional and statutory requirements.

Accordingly, on March 10, 1970, petitioners moved in the district court (App. 25a) for the replacement

of Richmond's freedom of choice plan with a plan that complied with this Court's decision in *Green v. County School Board*. The motion included a request for attorneys' fees. Between that date and May 26, 1971, when the district court ruled on the motion for attorneys' fees, the court had disapproved two plans submitted by the respondents (App. 115a-118a), and had finally accepted a third for the 1971-1972 school session (App. 118a). The court determined that, on the record before it, an award of attorneys' fees in the sum of \$43,355 was justified by the respondents' conduct both in making necessary petitioners' 1970 reopening of the case and in the course of the ensuing phase of this litigation (App. 128a-135a). Alternatively, the district court held that the fee award was justified by the fact that the petitioners had acted as "private attorneys general" in securing respondents' compliance with important constitutional and statutory obligations, this vindication of paramount federal policies having benefitted not only the petitioners but an entire class (App. 128a, 135a-140a).

The court of appeals (with one judge dissenting) reversed, holding that the district court was without authority to award attorneys' fees. The court held, first, that the respondents' conduct did not constitute the "obdurate obstinacy" which it said was a requisite for an attorney fee award in school desegregation cases (App. 161a-177a). The court further concluded that, in the absence of express statutory authority, there is no other basis on which attorneys' fees could properly be awarded (App. 177a-186a).

Finally, employing the maxim *expressio unius est exclusio alterius*, the court relied upon the fact that a provision for attorneys' fees in school desegregation cases was not included in the Civil Rights Act of 1964 as indicating a congressional intent to constrict the availability of fee awards (App. 180a-181a).²

In this Court the respondents seek to defend the decision of the court of appeals by contending that desegregation cases should be an exception to the principles established by decisions of this Court and other courts authorizing attorney fee awards on grounds other than the "conduct" of the defendant (Resp. Br. 5-7, 23-24, 26).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals erred in concluding that, in the absence of express statutory authority, the only basis for an award of attorneys' fees in a school desegregation case is conduct on the part of the defendants amounting to "obdurate obstinacy."³ The dis-

² The panel in this case also adopted the court's *en banc* decision in *Thompson v. School Board*, 472 F. 2d 177 (C.A. 4), that Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. (Supp. II) 1617, does not support an award of attorneys' fees for legal services rendered prior to June 30, 1972 (App. 186a-188a). Since we believe that the district court's award of attorneys' fees was proper on other grounds when it was made (prior to the enactment of Section 718), we do not discuss that issue.

³ As this Court noted in *Hall v. Cole*, 412 U.S. 1, 5, 15, there is a line of authority for awarding attorneys' fees based on the conduct of a party in a particular case, either before or during the litigation. We do not rely upon this rationale in urging reversal of the court of appeals' decision. The "bad faith," "obdurate obstinacy," or "conduct-oriented" rationale is essen-

trict court's award of attorneys' fees in this case should have been sustained under principles previously established by this Court and other courts concerning the inherent equitable authority of federal courts to award attorneys' fees in various circumstances in the absence of explicit statutory authorization.

Thus, an award of attorneys' fees may be warranted where—as here—the plaintiff's litigation produces significant common benefits, pecuniary or otherwise, not only for the plaintiff but also for others in a group or class, thereby making it appropriate that the costs of obtaining the benefit be shared through the award of fees. Support for the fee award in this case can also be found in cases authorizing such awards where—as here—the plaintiff acts as a private attorney general in vindicating important federal constitutional or statutory policies.

The court of appeals' inference, from the lack of an express provision for attorneys' fees in related tially punitive in nature. *Hall v. Cole, supra*, 412 U.S. at 5. It is seriously limited as a means for inducing attorneys to handle meritorious cases challenging illegal conduct for persons unable to afford an attorney, for there is insufficient predictability as to the availability of a fee award. The "bad faith" rationale is related to other similar sanctions used to regulate the conduct of parties and attorneys. *E.g.*, Fed.R.Civ.P. 37(a), 56(g); cf. Rule 57(7) of the Rules of this Court. The propriety of its application in a particular case calls for a detailed review of conduct before or during litigation, and courts may be reluctant to award fees if to do so they must brand one side with an opprobrious characterization. In many, perhaps most, of the cases in which attorneys' fees have been awarded on this basis, an award would have been warranted under the "common benefit" or "private attorney general" rationales discussed later in the text.

legislation, that a fee award is barred in this case, is contrary to this Court's decisions requiring either an explicit limitation of the power of federal courts to award this traditional equitable remedy or such a detailed and intricate scheme of remedies that such a limitation may fairly be implied. The finding of an implied statutory bar was particularly unwarranted here, where the suit was filed pursuant to the broad grant of equitable jurisdiction in the federal courts under 42 U.S.C. 1983 to "redress" deprivations of constitutional rights.

ARGUMENT

I. FEDERAL COURTS HAVE AUTHORITY, IN THE ABSENCE OF LEGISLATION TO THE CONTRARY, TO AWARD ATTORNEYS' FEES TO A PLAINTIFF WHO AS A "PRIVATE ATTORNEY GENERAL" BENEFITS A CLASS OR GROUP BY VINDICATING CONSTITUTIONAL OR OTHER LEGAL OBLIGATIONS OF THE DEFENDANT TO THE PLAINTIFF AND OTHERS

1. The court of appeals' basic premise in this case—that, in the absence of statutory authority, attorneys' fees may be awarded only in the event of conduct constituting "obdurate obstinacy"—is contrary to the decisions of this Court. Only last term, this Court reiterated that while under "the traditional American rule" attorneys' fees may not ordinarily be awarded (in the absence of statutory or contractual authority) to a successful plaintiff in an action at law between private parties for damages,⁴ "federal courts, in the exercise of their equitable powers, may award attor-

⁴ *E.g.*, *Arcambel v. Wiseman*, 3 Dall. 306; *Day v. Woodworth*, 13 How. 363; *Oelrichs v. Spain*, 15 Wall. 211; *Hauenstein v. Lynham*, 100 U.S. 483.

neys' fees when the interests of justice so require." *Hall v. Cole*, *supra*, 412 U.S. at 4-5. Derived from "the original authority of the chancellor to do equity in a particular situation" (*Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166; see, *e.g.*, *Trustees v. Greenough*, 105 U.S. 527, 532), this is an inherent power to be exercised in accordance with principles of equity. 412 U.S. at 5. Beyond indicating that cases warranting an award of attorneys' fees are likely to be the exception, rather than the rule (see *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-392), this Court has not attempted to circumscribe the outer limits of this power, except, of course, to recognize that it may be limited by statute. *E.g.*, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714. Rather, as this Court recognized in *Hall v. Cole*, "federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.' " 412 U.S. at 5.

One line of decisions has held the award of attorneys' fees to be proper where the plaintiff's litigation has produced significant benefits for others besides the plaintiff, such as by preventing or undoing illegal action by the defendant and thereby protecting, creating or recovering a common fund (*Trustees v. Greenough*, *supra*; *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116); by establishing a precedent that will permit others to require the defendant to respect their rights (*Sprague v. Ticonic Nat'l Bank*, *supra*; or by establishing a violation of law on a matter as to which the defendant owes a fiduciary

duty to the plaintiff and others. *E.g.*, *Mills v. Electric Auto-Lite Co.*, *supra*; *Hall v. Cole*, *supra*. The decisions in *Mills* and *Hall* establish that the "benefit" produced by the plaintiff's litigation need not be pecuniary in nature and need not have monetary value. *E.g.*, *Mills*, *supra*, 396 U.S. at 392, 395-396; *Hall*, *supra*, 412 U.S. at 5-6, n. 7.

Under another line of authority, attorneys' fees have been awarded where the plaintiff acts as "private attorney general" (cf. *Newman v. Piggie Park Enterprises, Inc.*, *supra*, 390 U.S. at 402) in vindicating statutory policy or constitutional commands, thereby augmenting otherwise limited governmental enforcement resources. *E.g.*, *Lee v. Southern Home Sites Corp.*, 444 F. 2d 143 (C.A. 5); *Knight v. Auciello*, 453 F. 2d 852 (C.A. 1); cf. *Mills v. Electric Auto-Lite Co.*, *supra*, 396 U.S. at 396. See, also, *Trafficante v. Metropolitan Life Ins. Co.*, *supra*, 409 U.S. at 211. This Court has previously recognized the important role played by the availability of an award of attorneys' fees in cases where the authorized lawsuits by private parties are likely to be expensive to maintain to a successful conclusion and offer little or no promise of financial gain to the plaintiffs. Thus, in *Hall v. Cole*, *supra*, involving provisions authorizing private suit under the federal labor laws,⁵ the Court noted that to deny attor-

⁵ The provisions involved in *Hall* were excluded from the enforcement authority of the Secretary of Labor (see 29 U.S.C. 521(a); cf. 29 U.S.C. 440, 464, 482) and were therefore enforceable only by an aggrieved private party. Because the Court affirmed the attorney fee award in *Hall* on the "common benefit" rationale, it had no occasion to rely upon the "private attorney general" rationale. 412 U.S. at 5-6, n. 7.

ney fees could be "tantamount to repealing the Act itself by frustrating its basic purpose;" without the opportunity to recover counsel fees "the grant of federal jurisdiction is but a gesture, for few * * * could avail themselves of it." *Id.* at 13.⁶

2. The foregoing principles were correctly applied by the district court in its determination that attorneys' fees should be awarded here. The district court noted that, despite the obvious public importance of litigation to enforce constitutional protections, a school desegregation suit is the "sort of enterprise * * * on which any private individual should shudder to embark" in view of the cost, unlikelihood of damages, and possible hostility toward counsel involved in such unpopular causes (App. 136a). It noted further that the resources of the opposing parties are disproportionate, since "[f]ew litigants—even the wealthiest—come into court with resources at once so formidable and so suited to the litigation * * *" as was available to the tax supported respondents (App. 135a-136a). Moreover,

* A characteristic of many of the cases in each of these lines of authority is that the plaintiff represented a minority group or interest and only by resort to the courts could the plaintiff ensure that the defendants fulfilled their fiduciary or other obligations to persons in the plaintiff's situation. Particularly where the defendant is a governmental entity, such litigation may be regarded as a means of offsetting the possibly limited opportunities for minority interests to assure through the political process that their governing bodies fulfill their duties to them, as part of their obligations to the general community. The availability of an attorney fee award in such a case would presumably have the desirable effect of minimizing some barriers to this exercise of constitutional rights. Cf. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 515; *Boddie v. Connecticut*, 401 U.S. 371.

[t]he private lawyer in such a case most accurately may be described as a "private attorney general." Whatever the conduct of defendants may have been, it is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy of nondiscrimination as to a large proportion of citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof. The fulfillment of constitutional guaranties, when to do so profoundly alters a key social institution and causes reverberations of untraceable extent throughout the community, is not a private matter. * * * [T]he payment of fees and expenses in class actions like this one is a necessary ingredient of * * * a remedy. [App. 139a-140a.]⁷

Moreover, by this suit petitioners have benefited the respondent school officials and the public at large by bringing about the elimination of unlawful, discriminatory practices from the schools. They have thus

⁷ When this litigation was instituted in 1961, actions by private parties provided virtually the only means of enforcement of the constitutional constraints against racially segregated schools. Although the enforcement powers of the federal government have been enlarged since then (*e.g.*, 42 U.S.C. 2000c-6, 2000d *et seq.*), actions by private parties have made and will no doubt continue to make an indispensable contribution to the effort to ensure that state and local governments observe their obligations under the Constitution and federal civil rights laws. Without deprecating in any way what has been accomplished by private litigation in this field, it is also fair to suggest that the desegregation of the Nation's public schools required by *Brown v. Board of Education*, 349 U.S. 294, 301, may well have been achieved with far swifter "deliberate speed" if attorneys' fee awards had more readily been perceived to be available in such cases.

benefited the people of Richmond by vindicating their Fourteenth Amendment rights—just as the corporate stockholders in *Mills* were benefited by the plaintiffs' protection of their suffrage rights and the union members in *Hall* were benefited by the plaintiff's protection of their freedom of speech. Requiring the publicly financed school board to reimburse petitioners' attorneys' fees out of its funds "simply shifted the costs of litigation to 'the class that has benefited from them and that would have had to pay them had it brought the suit.' " *Hall v. Cole, supra*, 412 U.S. at 7.

II. THERE WAS NO STATUTORY BAR TO THE DISTRICT COURT'S AWARD OF ATTORNEYS' FEES IN THIS CASE

The court of appeals apparently concluded that an award of attorneys' fees in this case was barred by the failure of Congress to include in the Civil Rights Act of 1964 any specific provision authorizing attorneys' fees in school desegregation cases (App. 180a-181a). That conclusion, however, was contrary to this Court's decisions concerning statutory preclusion of attorney fee awards.

While it is unquestioned that Congress can limit a federal court's inherent equitable authority to award attorneys' fees, a court ought not conclude that its power has been limited in the absence of "a definitive and absolute setting of the Congressional face against the giving of such incidental relief by the courts where compatible with sound and established equitable principles."⁵ *Hall v. Cole, supra*, 412 U.S. at 12. As indicated by *Hall* and *Mills v. Electric Auto-Lite*

⁵ *E.g.*, 28 U.S.C. 2412, discussed *supra*, p. 2.

Co., *supra*, 396 U.S. at 390-391, such a preclusion should not be inferred from the mere fact that other provisions of the legislation in question or related legislation (see pp. 2, 5, *supra*) do expressly deal with attorney fee awards. Implied preclusion may be found, of course, where Congress has so "meticulously detailed" a set of such "intricate remedies" for a statutory cause of action that it may reasonably be concluded that an award of attorney fees was meant to be excluded. *E.g.*, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*, 386 U.S. at 719.*

Here, petitioners' cause of action derives from the Constitution and from 42 U.S.C. 1983, neither of which contains any basis for concluding that attorney fee awards are precluded in such cases. To the contrary, Section 1983 provides broadly that a person who has been deprived of rights, privileges, or immunities secured by the Constitution and laws may obtain "redress" in an action at law, suit in

* Our position does not suggest that an express statutory provision for attorneys' fees (such as Congress has now enacted in this field, see n. 2, *supra*) is superfluous. Such provisions may make fee awards available in cases such as private damage actions where they would otherwise not ordinarily be available under traditional equitable principles (*e.g.*, 15 U.S.C. 77k(e)); they may make such awards mandatory where a plaintiff prevails (*e.g.*, 15 U.S.C. 15); they may impose a particular standard (*e.g.*, 20 U.S.C. (Supp. II) 1617 and 42 U.S.C. 2000a-3(b), 2000e-5(k), said by this Court to call for an award of fees to a successful plaintiff "unless special circumstances would render such an award unjust," *Newman v. Piggie Park Enterprises, Inc.*, *supra*, 390 U.S. at 402; *Northcross v. Board of Educ.*, 412 U.S. 427, 428); or they may serve simply to emphasize the view of Congress that such awards may be particularly appropriate in the type of case covered by such a provision.

equity or other proper proceeding. The express grant of equity jurisdiction is significant because this Court has held that under such a grant of jurisdiction a court may fashion any remedy that would be appropriate in the exercise of equitable jurisdiction (see, e.g., *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 290-292; *Porter v. Warner Holding Co.*, 328 U.S. 395, 399-402; *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330), especially in litigation not strictly private in nature. See *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 552.

There was, accordingly, no statutory bar to the district court's award of attorneys' fees in this case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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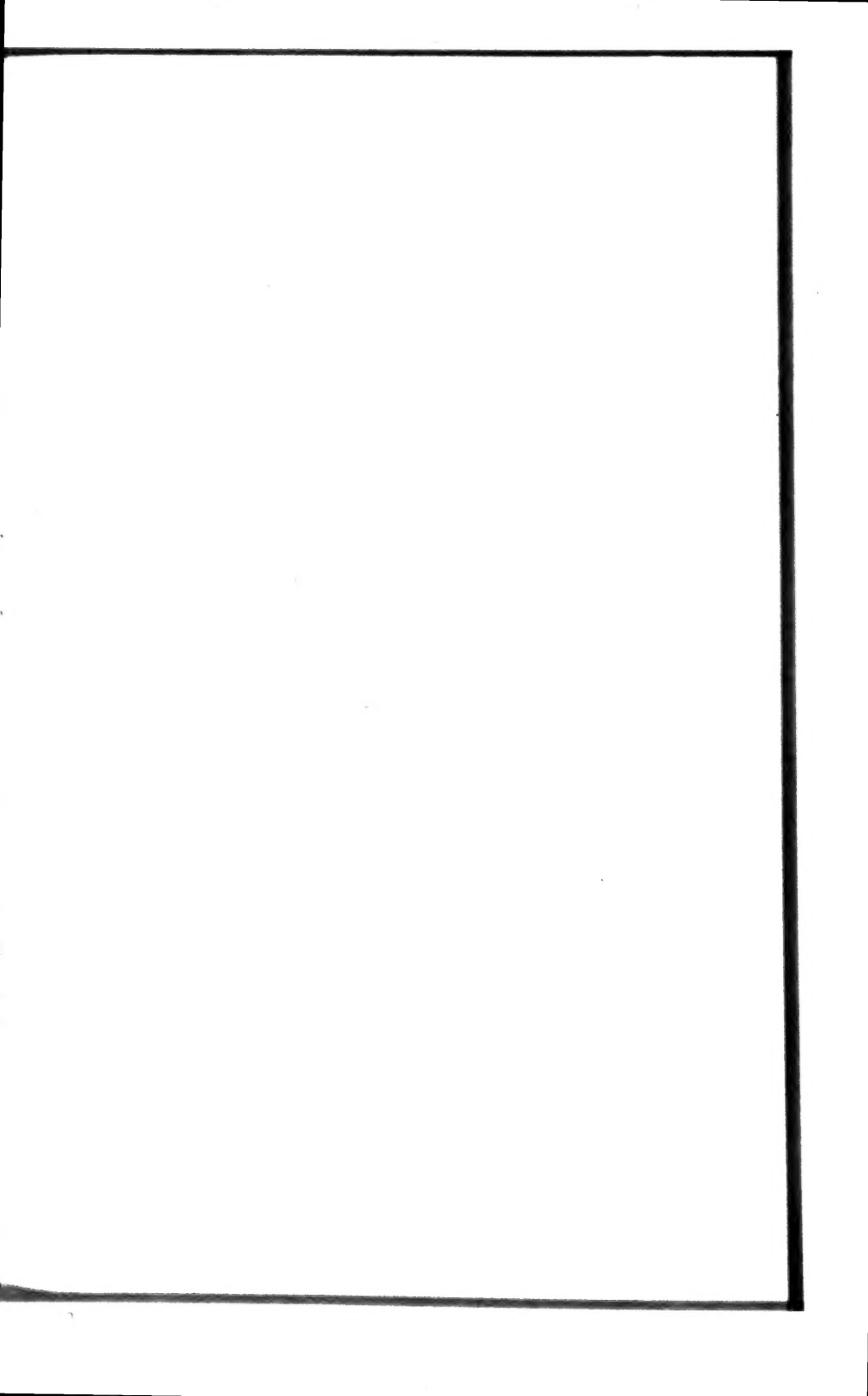
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NOVEMBER 1973.



BRADLEY ET AL. v. SCHOOL BOARD OF THE CITY
OF RICHMOND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 72-1322. Argued December 5, 1973—Decided May 15, 1974

The District Court on May 26, 1971, awarded to the successful plaintiff-petitioners, Negro parents and guardians, in this protracted litigation involving the desegregation of the Richmond, Virginia, public schools, expenses and attorneys' fees for services rendered from March 10, 1970, to January 29, 1971. On March 10, 1970, petitioners had moved in the District Court for additional relief under *Green v. County School Board of New Kent County*, 391 U. S. 430, in which this Court held that a freedom-of-choice plan (like the one previously approved for the Richmond schools) was not acceptable where methods promising speedier and more effective conversion to a unitary school system were reasonably available. Respondent School Board then conceded that the plan under which it had been operating was not constitutional. After considering a series of alternative and interim plans, the District Court on April 5, 1971, approved the Board's third proposed plan, and the order allowing fees followed shortly thereafter. Noting the absence of any explicit statutory authorization for such an award in this type of case, the court predicated its ruling on the grounds (1) that actions taken and defenses made by the School Board during the relevant period resulted in an unreasonable delay in desegregation of the schools, causing petitioners to incur substantial expenditures to secure their constitutional rights, and (2) that plaintiffs in actions of this kind were acting as "private attorneys general," *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, in leading the School Board into compliance with the law, thus effectuating the constitutional guarantees of nondiscrimination. The Court of Appeals reversed, stressing that "if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts." Following initial submission of the case to the Court of Appeals but before its decision, Congress enacted § 718 of the Education Amendments Act of 1972, which granted a federal court authority to award the prevailing party a

reasonable attorney's fee when appropriate upon entry of a final order in a school desegregation case, the applicability of which to this and other litigation the court then considered. In the other cases, the court held that § 718 did not apply to services rendered prior to July 1, 1972, the effective date of § 718, and in this case reasoned that there were no orders pending or appealable on either May 26, 1971, when the District Court made its fee award, or on July 1, 1972, and that therefore § 718 could not be used to sustain the award. *Held*: Section 718 can be applied to attorneys' services that were rendered before that provision was enacted, in a situation like the one here involved where the propriety of the fee award was pending resolution on appeal when the statute became law. Pp. 710-724.

(a) An appellate court must apply the law in effect at the time it renders its decision, *Thorpe v. Housing Authority of the City of Durham*, 393 U. S. 268, 281, unless such application would work a manifest injustice or there is statutory direction or legislative history to the contrary. Pp. 711-716.

(b) Such injustice could result "in mere private cases between individuals," *United States v. Schooner Peggy*, 1 Cranch 103, 110, the determinative factors being the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in law upon those rights. Upon consideration of those aspects here (see *infra*, (c)-(e)), it cannot be said that the application of the statute would cause injustice. Pp. 716-721.

(c) There was a disparity in the respective abilities of the parties to protect themselves, and the litigation did not involve merely private interests. Petitioners rendered substantial service to the community and to the Board itself by bringing it into compliance with its constitutional mandate and thus acting as a "private attorney general" in vindicating public policy. Pp. 718-719.

(d) Application of § 718 does not affect any matured or unconditional rights, the School Board having no unconditional right to the funds allocated to it by the taxpayers. P. 720.

(e) No increased burden was imposed since the statute did not alter the Board's constitutional responsibility for providing pupils with a nondiscriminatory education, and there is no change in the substantive obligation of the parties. Pp. 720-721.

(f) The Court of Appeals erred in concluding that § 718 was inapplicable to the petitioners' request for fees because there was no final order pending unresolved on appeal, since the language of § 718 is not to be read to mean that a fee award must be made

simultaneously with the entry of a desegregation order, and a district court must have discretion in a school desegregation case to award fees and costs incident to the final disposition of interim matters. Pp. 721-723.

(g) Since the District Court made an allowance for services to January 29, 1971, when petitioners were not yet the "prevailing party" within the meaning of § 718, the fee award should be recomputed to April 5, 1971, or thereafter. Pp. 723-724.

472 F. 2d 318, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which all Members joined except MARSHALL and POWELL, JJ., who took no part in the consideration or decision of the case.

William T. Coleman, Jr., argued the cause for petitioners. With him on the briefs were *Jack Greenberg*, *James M. Nabrit III*, *Norman J. Chachkin*, *Charles Stephen Ralston*, *Eric Schnapper*, and *Louis R. Lucas*.

George B. Little argued the cause for respondents. With him on the brief were *James K. Cluverius* and *Conard B. Mattox, Jr.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this protracted school desegregation litigation, the District Court awarded the plaintiff-petitioners expenses and attorneys' fees for services rendered from March 10, 1970, to January 29, 1971. 53 F. R. D. 28 (ED Va. 1971). The United States Court of Appeals for the Fourth Circuit, one judge dissenting, reversed. 472 F. 2d 318 (1972). We granted certiorari, 412 U. S. 937 (1973), to determine whether the allowance of attorneys' fees

*Briefs of *amici curiae* urging reversal were filed by Solicitor General Bork, Assistant Attorney General Pottinger, Deputy Solicitor General Wallace, and Gerald P. Norton for the United States, and by David S. Tatel and Armand Derfner for the Lawyers' Committee for Civil Rights Under Law.

was proper. Pertinent to the resolution of the issue is the enactment in 1972 of § 718 of Title VII, the Emergency School Aid Act, 20 U. S. C. § 1617 (1970 ed., Supp. II), as part of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, 369.

I

The suit was instituted in 1961 by 11 Negro parents and guardians against the School Board of the city of Richmond, Virginia, as a class action under the Civil Rights Act of 1871, 42 U. S. C. § 1983, to desegregate the public schools. On March 16, 1964, after extended consideration,¹ the District Court approved a "freedom of choice" plan by which every pupil was permitted to attend the school of the pupil's or the parents' choice, limited only by a time requirement for the transfer application and by lack of capacity at the school to which transfer was sought. On appeal, the Fourth Circuit, sit-

¹ See 317 F. 2d 429 (CA4 1963). Before trial, one pupil-plaintiff was admitted to the school of his choice, and the court ordered admission of the remaining 10. The District Court found that, in general, during the 1961-1962 school year, pupil assignments in Richmond were being made on the basis of dual attendance zones; that promotions were controlled by a "feeder" system whereby pupils initially assigned to Negro schools were promoted routinely only to Negro schools; and that, in the handling of some transfer requests from Negro pupils, the students were required to meet criteria to which white students of the same scholastic aptitude were not subject. The court declined, however, to grant general injunctive relief and ordered only the admission of the 10 pupils.

The Court of Appeals reversed in part. It held that not only were the individual minor plaintiffs entitled to relief, but that they were entitled to an injunction, on behalf of others of the class they represented and who were similarly situated, against the continuation of the discriminatory system and practices that were found to exist. *Id.*, at 438.

ting en banc, affirmed, with two judges dissenting in part, and held that the plan satisfied the Board's constitutional obligations. 345 F. 2d 310 (1965). The court saw no error in the trial court's refusal to allow the plaintiffs' attorneys more than a nominal fee (\$75). *Id.*, at 321. The dissenters referred to the fee as "egregiously inadequate." *Id.*, at 324. On petition for a writ of certiorari, this Court, *per curiam*, 382 U. S. 103 (1965), summarily held that the petitioners improperly had been denied a full evidentiary hearing on their claim that a racially based faculty allocation system rendered the plan constitutionally inadequate under *Brown v. Board of Education*, 347 U. S. 483 (1954). In vacating the judgment of the Court of Appeals and in remanding the case, we expressly declined to pass on the merits of the desegregation plan and noted that further judicial review following the hearing was not precluded. 382 U. S., at 105.

After the required hearing, the District Court, on March 30, 1966, approved a revised "freedom of choice" plan² submitted by the Board and agreed to by the peti-

² Under the approved plan, the Board undertook steps "to eliminate a dual school system in the assignment of pupils" and to assure that opportunities were provided "for white children and Negro children to associate on equal terms in the public schools." App. 21a-22a. Generally, the plan permitted any child to attend any school in the city at his proper grade. The specific steps to be taken included (a) action to correct inequality in enrollment in relationship to capacity where schools in close proximity to each other had significant enrollment differences, (b) efforts to acquaint pupils in all schools with opportunities in other schools, and (c) the planning and creation of citywide centers, including workshops, institutes, and seminars, serving pupils from all areas of the city. App. 22a-23a. In addition, the Board undertook to insure that the "pattern of assignment of teachers and other professional staff among the various schools of the system will not be such that schools are identifiable as intended for students of a particular race, color

tioners. App. 17a. It provided that if the steps taken by the Board "do not produce significant results during the 1966-67 school year, it is recognized that the freedom of choice plan will have to be modified." *Id.*, at 23a. This plan was in operation about four years. While it was in effect, *Green v. County School Board of New Kent County*, 391 U. S. 430 (1968), was decided. The Court there held that where methods promising speedier and more effective conversion to a unitary system were reasonably available, a freedom-of-choice plan was not acceptable. *Id.*, at 439-441.

Thereafter, on March 10, 1970, petitioners filed with the District Court a motion for further relief in the light of the opinions of this Court in *Green*, *supra*, in *Alexander v. Holmes County Board of Education*, 396 U. S. 19 (1969), and in *Carter v. West Feliciana Parish School Board*, 396 U. S. 290 (1970). Specifically, petitioners asked that the court "require the defendant school board forthwith to put into effect" a plan that would "promptly and realistically convert the public schools of the City of Richmond into a unitary non-racial system," and that the court "award a reasonable fee to [petitioners'] counsel." App. 25a. The court then ordered the Board to advise the court whether the public schools were being operated "in accordance with the constitutional requirements . . . enunciated by the United States Supreme Court." *Id.*, at 27a. The Board, by a statement promptly filed with the District Court, averred that it had operated the school system to the best of its knowledge and belief in accordance with the decree

or national origin, or such that teachers or other professional staff of a particular race are concentrated in those schools where all, or the majority, of the students are of that race." *Id.*, at 20a. Finally, the Board undertook to insure that the program for construction of new schools or additions to existing schools would "not be designed to perpetuate, maintain, or support racial segregation." *Id.*, at 23a.

of March 30, 1966, but that it has "been advised" that the city schools were "not being operated as unitary schools in accordance with the most recent enunciations of the Supreme Court." *Id.*, at 28a. It was also asserted that the Board had requested the Department of Health, Education, and Welfare to make a study and recommendation; that the Department had agreed to undertake to do this by May 1; and that the Board would submit a plan for the operation of the public school system not later than May 11. *Ibid.* Following a hearing, however, the District Court, on April 1, 1970, entered a formal order vacating its order of March 30, 1966, and enjoining the defendants "to disestablish the existing dual system" and to replace it "with a unitary system." See 317 F. Supp. 555, 558 (ED Va. 1970). Thereafter, the Board and several intervenors filed desegregation plans.

The initial plan offered by the Board and HEW was held unacceptable by the District Court on June 26, 1970. *Id.*, at 572. The court was concerned (a) with the fact that the Board had taken no voluntary action to change its freedom-of-choice plan after this Court's decision in *Green* two years before, *id.*, at 560, (b) with the plan's failure to consider patterns of residential segregation in fixing school zone lines, or to use transportation as a desegregation tool, despite the decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 431 F. 2d 138 (CA4 1970), *aff'd as modified*, 402 U. S. 1 (1971), and (c) with its failure to consider racial factors in zoning, despite the approval thereof in *Warner v. County School Board of Arlington County*, 357 F. 2d 452 (CA4 1966). 317 F. Supp., at 577-578. The District Court also rejected desegregation plans offered by intervenors and by the petitioners.³

³ The court rejected the petitioners' plan for utilizing contiguous zoning and pairing, satellite zoning, and noncontiguous pairing,

A second plan submitted by the Board was also deemed to be unsatisfactory in certain respects. Nonetheless, on August 17 the court found its adoption on an interim basis for 1970-1971 to be necessary, since the school year was to begin in two weeks.⁴ *Id.*, at 578. The court directed the defendants to file within 90 days a report setting out the steps taken "to create a unitary system . . . and . . . the earliest practical and reasonable date that any such system could be put into effect." *Ibid.*

The Board then submitted three other desegregation plans. Hearings were held on these and on still another plan submitted by the petitioners.⁵ On April 5, 1971,

together with the use of school and public transportation, because it felt that the lack of immediately available transportation facilities would preclude the plan's operation for the opening of the 1970-1971 school year. It noted that it otherwise found the plan to be reasonable and, if adopted, that it would result in a unitary system. 317 F. Supp. 555, 572 and 576 (ED Va. 1970). The court suggested that Richmond could not be desegregated without employment of techniques suggested by the petitioners and observed, "It would seem to the Court highly reasonable to require that the defendant school board take reasonably immediate steps toward this end." *Id.*, at 575.

⁴ The interim plan included contiguous and satellite zoning, pairing, and some public transportation, principally of those pupils who were indigent. The problems that continued to concern the court were, most importantly, the fact that under the plan a large number of the district's elementary students would continue to attend schools that would be 90% or more Negro, while at the same time four elementary schools would remain all white; in addition, two high schools and certain secondary schools would continue to be racially identifiable. *Id.*, at 572-576.

⁵ Under Plan I only proximal geographic zoning was to be used in making pupil assignments. This meant simply that a pupil would be assigned to the school nearest his home without regard to the resulting racial composition of that school. Although recognizing the desirability of neighborhood schools, the court rejected this plan

the court adopted the Board's third plan, which involved pupil reassignments and extensive transportation within the city. 325 F. Supp. 828 (ED Va. 1971).⁶

Meanwhile, the Board had moved for leave to make the school boards and governing bodies of adjoining Chester-

in view of the existence of Richmond housing patterns previously determined to have been fostered by governmental action. At the elementary and middle levels, this would have resulted in over half the students being assigned to schools that were racially identifiable; at the high school level almost 39% of the district's white pupils would have been isolated in one 97% white school. 325 F. Supp. 828, 833 (ED Va. 1971).

Plan II, which the Board most actively supported, was held unacceptable in that it embraced a continuation of the 1970-1971 interim plan and did little to integrate the elementary schools. The plan involved the use of zoning, as did Plan I, and contiguous pairing whereby schools in adjoining zones would have been consolidated. *Id.*, at 834.

Plan III, which the court ordered into effect, called for extensive busing of students, proximal geographic zoning, clusters, satellites, and faculty racial balance. In addition, the elementary, middle and high schools were to have a minority-majority student ratio under which each group's projected enrollment in a particular school was to be at least half of the group's projected citywide ratio. *Id.*, at 834-844.

The court also rejected the petitioners' plan, finding that Plan III resulted in "a narrower spread" of minority-majority student ratios in the various schools. *Id.*, at 844-846.

⁶ Meanwhile, the District Court (a) on January 8, 1971, denied a motion made by some of the defendants that the judge disqualify himself because of personal bias, 324 F. Supp. 439 (ED Va. 1971); (b) on January 29 denied the petitioners' motion to order implementation of their proposed plan and also the Board's motion to modify the existing injunction restraining it from undertaking any new construction planning, 324 F. Supp. 456 (ED Va. 1971); and (c) on February 10 denied a motion for summary judgment as to certain defendants with respect to costs, fees, and damages, 324 F. Supp. 401 (ED Va. 1971). See also 315 F. Supp. 325 (ED Va. 1970); 51 F. R. D. 139 (ED Va. 1970).

field and Henrico Counties, as well as the Virginia State Board of Education, parties to the litigation, and to serve upon these entities a third-party complaint to compel them to take all necessary action to bring about the consolidation of the systems and the merger of the boards. The court denied the defense motion for the convening of a three-judge court. 324 F. Supp. 396 (ED Va. 1971).

On January 10, 1972, the court ordered into effect a plan for the integration of the Richmond schools with those of Henrico and Chesterfield Counties. 338 F. Supp. 67 (ED Va. 1972). On appeal, the Fourth Circuit, sitting en banc, reversed, with one judge dissenting, holding that state-imposed segregation had been "completely removed" in the Richmond school district and that the consolidation was not justified in the absence of a showing of some constitutional violation in the establishment and maintenance of these adjoining and separate school districts. 462 F. 2d 1058, 1069 (CA4 1972). We granted cross-petitions for writs of certiorari. 409 U. S. 1124 (1973). After argument, the Court of Appeals' judgment was affirmed by an equally divided Court. *Richmond School Board v. Board of Education*, 412 U. S. 92 (1973).

II

The petitioners' request for a significant award of attorneys' fees was included, as has been noted, in their pivotal motion of March 10, 1970. App. 25a. That application was renewed on July 2. *Id.*, at 66a. The District Court first suggested, by letter to the parties, that they attempt to reach agreement as to fees. When agreement was not reached, the court called for supporting material and briefs.⁷ In due course the court awarded counsel fees in the amount of \$43,355 for services ren-

⁷ Petitioners initially suggested \$46,820 in fees and \$13,327.56 in expenses, a total of \$60,147.56. App. 94a-95a.

dered from March 10, 1970, to January 29, 1971, and expenses of \$13,064.65. 53 F. R. D. 28, 43-44 (ED Va. 1971).

Noting the absence at that time of any explicit statutory authorization for an award of fees in school desegregation actions, *id.*, at 34, the court based the award on two alternative grounds rooted in its general equity power.⁸ First, the court observed that prior desegregation decisions demonstrated the propriety of awarding counsel fees when the evidence revealed obstinate noncompliance with the law or the use of the judicial process for purposes of harassment or delay in affording rights clearly owed.⁹ Applying the test enunciated by the Fourth Cir-

⁸ The court discussed, 53 F. R. D. 28, 34-36 (ED Va. 1971), but did not rely on, the "common fund" theory under which an individual litigant's success confers a substantial benefit on an ascertainable class and the exercise of the court's equitable discretion to allow a fee results in spreading the cost the litigant has incurred among those who have benefited by his efforts. See *Trustees v. Greenough*, 105 U. S. 527 (1882); *Sprague v. Ticonic National Bank*, 307 U. S. 161 (1939).

The court felt, however, that there were other grounds on which an award of counsel fees could be based. It referred to *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970), where this Court, recognizing the rule that attorneys' fees are not ordinarily recoverable as costs, nonetheless noted that exceptions to this rule existed "for situations in which overriding considerations indicate the need for such a recovery." *Id.*, at 391-392. There the Court approved an award of fees to successful shareholder plaintiffs in a suit to set aside a corporate merger accomplished through the use of a misleading proxy statement, in violation of § 14 (a) of the Securities Exchange Act of 1934. 15 U. S. C. § 78n (a). It was said, "The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale." 396 U. S., at 392. See also *Hall v. Cole*, 412 U. S. 1 (1973).

⁹ See *Brewer v. School Board of the City of Norfolk*, 456 F. 2d 943, 951-952 (CA4), cert. denied, 406 U. S. 933 (1972); *Nesbit v. Statesville City Board of Education*, 418 F. 2d 1040, 1043

cuit in 345 F. 2d, at 321, the court sought to determine whether "the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy." Examining the history of the litigation, the court found that at least since 1968 the Board clearly had been in default in its constitutional duty as enunciated in *Green*. While reluctant to characterize the litigation engendered by that default as unnecessary in view of the ongoing development of relevant legal standards, the court observed that the actions taken and the defenses asserted by the Board had caused an unreasonable delay in the desegregation of the schools and, as a result, had caused the plaintiffs to incur substantial expenditures of time and money to secure their constitutional rights.¹⁰

(CA4 1969); *Williams v. Kimbrough*, 415 F. 2d 874, 875 (CA5 1969), cert. denied, 396 U. S. 1061 (1970); *Rolfe v. County Board of Education of Lincoln County*, 391 F. 2d 77, 81 (CA6 1968); *Clark v. Board of Education of Little Rock School District*, 369 F. 2d 661, 670-671 (CA8 1966); *Griffin v. County School Board of Prince Edward County*, 363 F. 2d 206 (CA4), cert. denied, 385 U. S. 960 (1966); *Bell v. School Board of Powhatan County*, 321 F. 2d 494, 500 (CA4 1963).

¹⁰ The District Court stated:

"At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order.

"It is no argument to the contrary that political realities may compel school administrators to insist on integration by judicial decree and that this is the ordinary, usual means of achieving compliance with constitutional desegregation standards. If such considerations lead parties to mount defenses without hope of success, the judicial process is nonetheless imposed upon and the plaintiffs are callously put to unreasonable and unnecessary expense." 53 F. R. D., at 39.

As an alternative basis for the award, the District Court observed that the circumstances that persuaded Congress to authorize by statute the payment of counsel fees under certain sections of the Civil Rights Act of 1964¹¹ were present in even greater degree in school desegregation litigation. In 1970-1971, cases of this kind were characterized by complex issues pressed on behalf of large classes and thus involved substantial expenditures of lawyers' time with little likelihood of compensation or award of monetary damages. If forced to bear the burden of attorneys' fees, few aggrieved persons would be in a position to secure their and the public's interests in a nondiscriminatory public school system. Reasoning from this Court's *per curiam* decision, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968), the District Judge held that plaintiffs in actions of this kind were acting as private attorneys general in leading school boards into compliance with the law, thereby effectuating the constitutional guarantee of nondiscrimination and rendering appropriate the award of counsel fees. 53 F. R. D., at 41-42.

The Court of Appeals, in reversing, emphasized that the Board was not operating "in an area where the practical methods to be used were plainly illuminated or where prior decisions had not left a 'lingering doubt' as to the proper procedure to be followed," particularly in the light of uncertainties existing prior to this Court's then impending decision in *Swann v. Charlotte-Mecklenburg*

¹¹ Title 42 U. S. C. § 2000a-3 (b) authorizes an allowance of a reasonable attorney's fee to a prevailing party, other than the United States, in an action under the public accommodation subchapter of the Civil Rights Act of 1964. Similarly, 42 U. S. C. § 2000e-5 (k) authorizes an allowance of a reasonable attorney's fee to a prevailing party, other than the Equal Employment Opportunity Commission or the United States, in an action under the equal employment opportunity subchapter of that Act.

Board of Education, 402 U. S. 1 (1971). 472 F. 2d, at 327. It felt that by the failure of Congress to provide specifically for counsel fees "in a statutory scheme designed to further a public purpose, it may be fairly accepted that it did so purposefully," and that "if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts." *Id.*, at 330-331.

After initial submission of the case to the Court of Appeals, but prior to its decision, the Education Amendments of 1972, of which § 718 of Title VII of the Emergency School Aid Act is a part, became law. Section 718, 20 U. S. C. § 1617 (1970 ed., Supp. II), grants authority to a federal court to award a reasonable attorney's fee when appropriate in a school desegregation case.¹² The Court of Appeals, sitting en banc, then heard argument as to the applicability of § 718 to this and other litigation.¹³ In the other cases it held that only legal services rendered after July 1, 1972, the effective date of § 718, see Pub. L. 92-318, § 2 (c)(1), 86 Stat. 236, were compensable under that statute. *Thompson v. School Board*

¹² 20 U. S. C. § 1617 (1970 ed., Supp. II). Attorney fees.

"Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

¹³ The fee issue had been argued in the Court of Appeals on March 7, 1972. The Education Amendments of 1972 were approved by the President on June 23. The argument before the en banc court took place on October 2.

of the *City of Newport News*, 472 F. 2d 177 (CA4 1972). In the instant case the court held that, because there were no orders pending or appealable on either May 26, 1971, when the District Court made its fee award, or on July 1, 1972, when the statute became effective, § 718 did not sustain the allowance of counsel fees.

III

In *Northcross v. Board of Education of the Memphis City Schools*, 412 U. S. 427, 428 (1973), we held that under § 718 "the successful plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" We decide today a question left open in *Northcross*, namely, "whether § 718 authorizes an award of attorneys' fees insofar as those expenses were incurred prior to the date that that section came into effect." *Id.*, at 429 n. 2.

The District Court in this case awarded counsel fees for services rendered from March 10, 1970, when petitioners filed their motion for further relief, to January 29, 1971, when the court declined to implement the plan proposed by the petitioners. It made its award on May 26, 1971, after it had ordered into effect the non-interim desegregation plan which it had approved. The Board appealed from that award, and its appeal was pending when Congress enacted § 718. The question, properly viewed, then, is not simply one relating to the propriety of retroactive application of § 718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law.

This Court in the past has recognized a distinction between the application of a change in the law that takes place while a case is on direct review, on the one hand,

and its effect on a final judgment¹⁴ under collateral attack,¹⁵ on the other hand. *Linkletter v. Walker*, 381 U. S. 618, 627 (1965). We are concerned here only with direct review.

A

We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

The origin and the justification for this rule are found in the words of Mr. Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103 (1801):

"It is in the general true that the province of an appellate court is only to enquire whether a judg-

¹⁴ By final judgment we mean one where "the availability of appeal" has been exhausted or has lapsed, and the time to petition for certiorari has passed. *Linkletter v. Walker*, 381 U. S. 618, 622 n. 5 (1965).

¹⁵ In *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371, 374 (1940), the Court noted that the effect of a subsequent ruling of invalidity on a prior final judgment under collateral attack is subject to no fixed "principle of absolute retroactive invalidity" but depends upon consideration of "particular relations . . . and particular conduct." Questions "of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." *Ibid.* And in *Linkletter* it was observed, "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U. S., at 629.

See Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907 (1962); Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201 (1965).

ment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id.*, at 110.¹⁸

In the wake of *Schooner Peggy*, however, it remained unclear whether a change in the law occurring while a case was pending on appeal was to be given effect only where, by its terms, the law was to apply to pending cases, as was true of the convention under consideration in *Schooner Peggy*, or, conversely, whether such a change

¹⁸ *Schooner Peggy* concerned a condemnation following the seizure of a French vessel by an American ship. The trial court found that the vessel was within French territorial waters at the time of seizure and, hence, was not a lawful prize. On appeal, the Circuit Court reversed, holding that the vessel in fact was on the high seas. A decree was entered accordingly. While the case was pending on appeal to this Court, a convention with France was entered into providing in part that "Property captured, and not yet *definitively* condemned, or which may be captured before the exchange of ratifications . . . shall be mutually restored." 1 Cranch, at 107. This Court reversed, holding that it must apply the terms of the convention despite the propriety of the Circuit Court's decision when it was rendered, and that the vessel was to be restored since, by virtue of the pending appeal, it had not been "*definitively* condemned," *id.*, at 108.

in the law must be given effect *unless* there was clear indication that it was *not* to apply in pending cases. For a very long time the Court's decisions did little to clarify this issue.¹⁷

¹⁷ In *United States v. Chambers*, 291 U. S. 217 (1934), the Court held that pending prosecutions, including those on appeal, brought pursuant to the National Prohibition Act were to be dismissed in view of the interim ratification of the Twenty-first Amendment, absent inclusion of a saving clause. In *Carpenter v. Wabash R. Co.*, 309 U. S. 23 (1940), the Court, in reliance on *Schooner Peggy*, held that an amendment to the Bankruptcy Act, effected while the case was pending on petition for writ of certiorari, was to be given effect. The amendment, however, provided explicitly that it was applicable to railroad receiverships then pending in any United States court. In *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538 (1941), again in reliance on *Schooner Peggy*, it was held that a federal appellate court, in diversity jurisdiction, must follow a state supreme court decision changing the applicable state law subsequent to the decision in the federal trial court. In *Ziffrin, Inc. v. United States*, 318 U. S. 73 (1943), the Court held that an amendment to the Interstate Commerce Act, made after the hearing upon an application for a permit to continue contract carrier operations, was to be given effect. "A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law." *Id.*, at 78. In *United States v. Alabama*, 362 U. S. 602 (1960), the District Court had dismissed an action under the Civil Rights Act of 1957, 42 U. S. C. § 1971 (c), brought by the United States against the State of Alabama and others, and did so with respect to Alabama on the ground that the Act did not authorize the action against the State. While the case was pending after a grant of certiorari, the Civil Rights Act of 1960, 74 Stat. 86, was passed, expressly authorizing an action of that kind against a State. The Court applied the new statute without discussion of the legislative history and remanded the case with instructions to reinstate the action.

See also *Freeborn v. Smith*, 2 Wall. 160 (1865); *Moore v. National Bank*, 104 U. S. 625 (1882), where a state statute of limitations was construed by the state supreme court in a way contrary to the construction given theretofore by the lower federal court, and this Court followed the later construction; *Stephens v.*

Ultimately, in *Thorpe v. Housing Authority of the City of Durham*, 393 U. S. 268 (1969), the broader reading of *Schooner Peggy* was adopted, and this Court ruled that "an appellate court must apply the law in effect at the time it renders its decision." *Id.*, at 281. In that case, after the plaintiff Housing Authority had secured a state court eviction order, and it had been affirmed by the Supreme Court of North Carolina, *Housing Authority of the City of Durham v. Thorpe*, 267 N. C. 431, 148 S. E. 2d 290 (1966), and this Court had granted certiorari, 385 U. S. 967 (1966), the Department of Housing and Urban Development ordered a new procedural prerequisite for an eviction. Following remand by this Court for such further proceedings as might be appropriate in the light of the new directive, 386 U. S. 670 (1967), the state court adhered to its decision. 271 N. C. 468, 157 S. E. 2d 147 (1967).¹⁸ This Court again granted certiorari. 390 U. S. 942 (1968). Upon review, we held that, although the circular effecting the change did not indicate whether it

Cherokee Nation, 174 U. S. 445 (1899), where the Court upheld a federal statute, containing retrospectivity language and conferring jurisdiction upon this Court over cases on review of actions of the Dawes Commission, enacted after rulings below that decrees of the courts in the Indian territories were final; *Dinsmore v. Southern Express Co.*, 183 U. S. 115 (1901), where the Court, relying upon *Schooner Peggy*, applied a statute, enacted while the case was pending on certiorari, to affirm the judgment of the lower court; *Watts, Watts & Co. v. Unione Austriaca*, 248 U. S. 9 (1918); *Dorchy v. Kansas*, 264 U. S. 286, 289 (1924); *Missouri ex rel. Wabash R. Co. v. Public Service Comm'n*, 273 U. S. 126 (1927); *Sioux County v. National Surety Co.*, 276 U. S. 238, 240 (1928); *Patterson v. Alabama*, 294 U. S. 600, 607 (1935).

¹⁸ The Supreme Court of North Carolina held that since all "critical events" had occurred prior to the date of the circular, "[t]he rights of the parties had matured and had been determined before the directive was issued." 271 N. C., at 470, 157 S. E. 2d, at 149

was to be applied to pending cases or to events that had transpired prior to its issuance,¹⁹ it was, nonetheless, to be applied to anyone residing in the housing project on the date of its promulgation. The Court recited the language in *Schooner Peggy*, quoted above, and noted that that reasoning "has been applied where the change was constitutional, statutory, or judicial," 393 U. S., at 282 (footnotes omitted), and that it must apply "with equal force where the change is made by an administrative agency acting pursuant to legislative authorization." *Ibid.* *Thorpe* thus stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect.

Accordingly, we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature.²⁰ While neither our decision in *Thorpe* nor our decision today purports to hold that courts must always thus apply new laws to pending cases in the absence of clear legislative direction to the contrary,²¹ we

¹⁹ In our first *Thorpe* opinion, however, we did note, "While the directive provides that certain records shall be kept commencing with the date of its issuance, there is no suggestion that the basic procedure it prescribes is not to be followed in all eviction proceedings that have not become final." *Thorpe v. Housing Authority of the City of Durham*, 386 U. S. 670, 673 (1967).

²⁰ The Fourth Circuit has declined to apply § 718 to services rendered prior to its enactment on the ground that "legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the statute applied in that manner." *Thompson v. School Board of the City of Newport News*, 472 F. 2d 177, 178 (1972). The Fifth Circuit has done the same. *Johnson v. Combs*, 471 F. 2d 84, 86 (1972); *Henry v. Clarksdale Municipal Separate School Dist.*, 480 F. 2d 583, 585 (1973).

²¹ Where Congress has expressly provided, or the legislative history had indicated, that legislation was to be given only prospective

do note that insofar as the legislative history of § 718 is supportive of either position,²² it would seem to provide at least implicit support for the application of the statute to pending cases.²³

B

The Court in *Thorpe*, however, observed that exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision "had been made to prevent manifest injustice," citing *Greene v. United*

effect, the courts, in the absence of any attendant constitutional problem, generally have followed that lead. See, for example, *Goldstein v. California*, 412 U. S. 546, 551-552 (1973); *United States v. Thompson*, 356 F. 2d 216, 227 n. 12 (CA2 1965), cert. denied, 384 U. S. 964 (1966).

²² In *Johnson v. Combs*, the Fifth Circuit characterized the legislative history of § 718 as "inconclusive," 471 F. 2d, at 87. In *Thompson*, the Fourth Circuit rejected the view that the legislative history could be read to support the applicability of § 718 to services rendered prior to its effective date, but did not find any explicitly stated legislative intent to the contrary. 472 F. 2d, at 178.

²³ The legislation that ultimately resulted in the passage of § 718 grew out of a bill that would have provided for the establishment of a \$15 million federal fund from which successful litigants in school discrimination cases would be paid a reasonable fee "for services rendered, and costs incurred, after the date of enactment of this Act" (emphasis supplied). S. 683, § 11 (a), 92d Cong., 1st Sess. (1971). The bill was reported out of the Senate Committee on Labor and Public Welfare as S. 1557, with the relevant clause intact in § 11. See S. Rep. No. 92-61, pp. 55-56 (1971). The section, however, was stricken in the Senate, 117 Cong. Rec. 11338-11345 (1971), and the present language of § 718 took its place. *Id.*, at 11521-11529 and 11724-11726. The House, among other amendments, deleted all mention of counsel fees. In conference, the fee provision was restored. S. Rep. No. 92-798, p. 143 (1972).

Thus, while there is no explicit statement that § 718 may be applied to services rendered prior to enactment, we are reluctant specifically to read into the statute the very fee limitation that Congress eliminated.

States, 376 U. S. 149 (1964).²⁴ Although the precise category of cases to which this exception applies has not been clearly delineated, the Court in *Schooner Peggy* suggested that such injustice could result "in mere private cases between individuals," and implored the courts to "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." 1 Cranch, at 110. We perceive no such threat of manifest injustice present in this case. We decline, accordingly, to categorize it as an exception to *Thorpe's* general rule.

The concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.

²⁴ In *Greene*, the Court held that a claimant's right to recover lost earnings had become final as a result of the prior decision that the claimant had been wrongfully discharged, *Greene v. McElroy*, 360 U. S. 474 (1959), and of the District Court's order on remand. Accordingly, the Court ruled that his rights had matured under an earlier Department of Defense regulation, and declined to give retroactive effect to a new regulation that took effect while the claim was being processed. The inequity of a contrary holding was stressed by the Court:

"In a case such as the present, where the Government has acted without authority in causing the discharge of an employee without providing adequate procedural safeguards, we should be reluctant to conclude that a regulation, not explicitly so requiring, conditions restitution on a retrospective determination of the validity of the substantive reasons for the Government action—reasons which the employee was not afforded an adequate opportunity to meet or rebut at the time of his discharge." 376 U. S., at 162.

As noted, the Court, in *Thorpe v. Housing Authority of the City of Durham*, 393 U. S. 268 (1969), characterized *Greene* as an exception to the general rule of *Schooner Peggy*, "made to prevent manifest injustice." *Id.*, at 282 and n. 43.

In this case the parties consist, on the one hand, of the School Board, a publicly funded governmental entity, and, on the other, a class of children whose constitutional right to a nondiscriminatory education has been advanced by this litigation. The District Court rather vividly described what it regarded as the disparity in the respective abilities of the parties adequately to present and protect their interests.²⁵ Moreover, school desegregation litigation is of a kind different from "mere private cases between individuals." With the Board responsible for the education of the very students who brought suit against it to require that such education comport with constitutional standards, it is not appropriate to view the parties as engaged in a routine private lawsuit. In this litigation the plaintiffs may be recognized as having rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large by securing for it the benefits assumed to flow from a nondiscriminatory educational system.²⁶ *Brown v. Board of Education*, 347 U. S., at 494.

²⁵ "[F]rom the beginning the resources of opposing parties have been disproportionate. Ranged against the plaintiffs have been the legal staff of the City Attorney's office and retained counsel highly experienced in trial work. . . . Few litigants—even the wealthiest—come into court with resources at once so formidable and so suited to the litigation task at hand. . . .

"Moreover, this sort of case is an enterprise on which any private individual should shudder to embark. . . . To secure counsel willing to undertake the job of trial . . . necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes." 53 F. R. D., at 40.

²⁶ See Dept. of Health, Education, and Welfare, J. Coleman et al., *Equality of Educational Opportunity* (1966); United States Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967). See also *Trafficante v. Metropolitan Life Insurance Co.*, 409 U. S. 205 (1972).

In *Northcross* we construed, as in *pari passu*, § 718 and § 204 (b) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a-3 (b), providing for an award of counsel fees to a successful plaintiff under the public accommodations title of that Act. Our discussion of the latter provision in *Piggie Park* is particularly apt in the context of school desegregation litigation:

"When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." 390 U. S., at 401-402 (footnotes omitted).

Application of § 718 to such litigation would thus appear to have been anticipated by Mr. Chief Justice Marshall in *Schooner Peggy* when he noted that in "great national concerns . . . the court must decide according to existing laws." 1 Cranch, at 110. Indeed, the circumstances surrounding the passage of § 718, and the numerous expressions of congressional concern and intent with respect to the enactment of that statute, all proclaim its status as having to do with a "great national concern."²⁷

²⁷ It is particularly in the area of desegregation that this Court in *Newman* and in *Northcross* recognized that, by their suit, plain-

The second aspect of the Court's concern that injustice may arise from retrospective application of a change in law relates to the nature of the rights effected by the change. The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional. See *Greene v. United States*, 376 U. S., at 160; *Claridge Apartments Co. v. Commissioner*, 323 U. S. 141, 164 (1944); *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913). We find here no such matured or unconditional right affected by the application of § 718. It cannot be claimed that the publicly elected School Board had such a right in the funds allocated to it by the taxpayers. These funds were essentially held in trust for the public, and at all times the Board was subject to such conditions or instructions on the use of the funds as the public wished to make through its duly elected representatives.

The third concern has to do with the nature of the impact of the change in law upon existing rights, or, to state it another way, stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard. In *Thorpe*, we were careful to note that by the circular the "respective obligations of both HUD and the Authority under the annual contributions contract remain unchanged. . . . Likewise, the lease agreement between

tiffs vindicated a national policy of high priority. Other courts have given explicit and implicit recognition to the priority placed on desegregation litigation by the Congress. See *Knight v. Auciello*, 453 F. 2d 852, 853 (CA1 1972) and *Lee v. Southern Home Sites Corp.*, 444 F. 2d 143, 145 (CA5 1971) (housing); *Johnson v. Combs*, 471 F. 2d, at 86 (schools); *Miller v. Amusement Enterprises, Inc.*, 426 F. 2d 534, 537-538 (CA5 1970) (public accommodation); *Cooper v. Allen*, 467 F. 2d 836, 841 (CA5 1972) (employment).

the Authority and petitioner remains inviolate." 393 U. S., at 279. Here no increased burden was imposed since § 718 did not alter the Board's constitutional responsibility for providing pupils with a nondiscriminatory education. Also, there was no change in the substantive obligation of the parties. From the outset, upon the filing of the original complaint in 1961, the Board engaged in a conscious course of conduct with the knowledge that, under different theories, discussed by the District Court and the Court of Appeals, the Board could have been required to pay attorneys' fees. Even assuming a degree of uncertainty in the law at that time regarding the Board's constitutional obligations, there is no indication that the obligation under § 718, if known, rather than simply the common-law availability of an award, would have caused the Board to order its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs.

The availability of § 718 to sustain the award of fees against the Board therefore merely serves to create an additional basis or source for the Board's potential obligation to pay attorneys' fees. It does not impose an additional or unforeseeable obligation upon it.

Accordingly, upon considering the parties, the nature of the rights, and the impact of § 718 upon those rights, it cannot be said that the application of the statute to an award of fees for services rendered prior to its effective date, in an action pending on that date, would cause "manifest injustice," as that term is used in *Thorpe*, so as to compel an exception of the case from the rule of *Schooner Peggy*.

C

Finally, we disagree with the Court of Appeals' conclusion that § 718 by its very terms is inapplicable to the petitioners' request for fees "because there was no

'final order' pending unresolved on appeal," 472 F. 2d, at 331, when § 718 became effective, or on May 26, 1971, when the District Court made its award.

It is true that when the District Court entered its order, it was at least arguable that the petitioners had not yet become "the prevailing party," within the meaning of § 718. The application for fees had been included in their March 10, 1970, Motion for Further Relief in the light of developments indicated by the decision two years before in *Green*. The Board's first plan was disapproved by the District Court on June 26. Its second plan was also disapproved but was ordered into effect on an interim basis on August 17 for the year about to begin. The third plan was ultimately approved on April 5, 1971, and the order allowing fees followed shortly thereafter.

Surely, the language of § 718 is not to be read to the effect that a fee award must be made simultaneously with the entry of a desegregation order. The statute, instead, expectedly makes the existence of a final order a prerequisite to the award. The unmanageability of a requirement of simultaneity is apparent when one considers the typical course of litigation in a school desegregation action. The history of this litigation from 1970 to 1972 is illustrative. The order of June 20, 1970, suspending school construction, the order of August 17 of that year placing an interim plan in operation, and the order of April 5, 1971, ordering the third plan into effect, all had become final when the fee award was made on May 26, 1971.²⁸ Since most school cases can be expected

²⁸ Since the finality of these orders is not contested, we are not called upon to construe the finality language as it appears in § 718. The only court that has dealt with the issue under this statute has held that the most suitable test for determining finality is appealability under 28 U. S. C. § 1291. See *Johnson v. Combs*, 471 F. 2d, at 87.

This Court has been inclined to follow a "pragmatic approach" to

to involve relief of an injunctive nature that must prove its efficacy only over a period of time and often with frequent modifications, many final orders may issue in the course of the litigation. To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary evidenced by the passage of § 718. A district court must have discretion to award fees and costs incident to the final disposition of interim matters. See 6 J. Moore, *Federal Practice* ¶ 54.70 (5) (1974 ed.). Further, the resolution of the fee issue may be a matter of some complexity and require, as here, the taking of evidence and briefing. It would therefore be undesirable to delay the implementation of a desegregation plan in order to resolve the question of fees simultaneously. The District Court properly chose not to address itself to the question of the award until after it had approved the noninterim plan for achievement of the unitary school system in Richmond on April 5, 1971.

We are in agreement, however, with the dissenting judge of the Court of Appeals when he observed, 472 F. 2d, at 337, that the award made by the District Court for services from March 10, 1970, to January 29, 1971,

the question of finality. *Brown Shoe Co. v. United States*, 370 U. S. 294, 306 (1962). And we have said that a final decision, within the meaning of § 1291, "does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U. S. 148, 152 (1964); see *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541, 545 (1949).

Without wishing affirmatively to construe the statute in detail in the absence of consideration of the issue by the lower courts, we venture to say only that the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees in school desegregation cases. See C. Wright, *Federal Courts* § 101 (2d ed. 1970).

did not precisely fit § 718's requirement that the beneficiary of the fee order be "the prevailing party." In January 1971 the petitioners had not yet "prevailed" and realistically did not do so until April 5. Consequently, any fee award was not appropriately to be made until April 5. Thereafter, it may include services at least through that date. This, of course, will be attended to on remand.

Accordingly, we hold that § 718 is applicable to the present situation, and that in this case the District Court in its discretion may allow the petitioners a reasonable attorneys' fee for services rendered from March 10, 1970, to or beyond April 5, 1971. The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL and MR. JUSTICE POWELL took no part in the consideration or decision of this case.

